Supreme Court of the United States

OCTOBER TERM, 1963

No. 813

STEWART L. UDALL, SECRETARY OF THE INTERIOR, PETITIONER

vs.

JAMES K. TALLMAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17598

JAMES K. TALLMAN, ALICE P. TALLMAN, CHRISTINE FLEISCHER, WILLIAM O. RABOURN, HARRY B. COCKRUM, BAILEY E. BELL, JAMES G. CARLSON, MICHAEL F. BIERNE, JAMES E. O'MALLEY, and WALDO E. COYLE, APPELLANTS

vs.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE

[File Endorsement Omitted]

Appeals From The United States District Court For The District of Columbia

JOINT APPENDIX—filed April 22, 1963

[fol. B]

IN THE UNITED STATES DISTRICT COURT

RELEVANT DOCKET ENTRIES

June 8, 1962 —Complaint with attached Exhibits A through G, CA 1852-62

July 18, 1962 —Defendant's motion to dismiss

August 23, 1962 —Plaintiff's motion for summary judgment

August 23, 1962 —Statement under Rule 9(h) to accompany plaintiff's motion for summary judgment

September 4, 1962—Defendant's motion for summary judgment

September 4, 1962—Defendant's statement and counterstatement under Rule 9(h) of material facts as to which there is no genuine issue in support of defendant's motion for summary judgment

September 4, 1962—Defendant's response to plaintiff's statement of material facts.

October 16, 1962 —Memorandum by Judge Charles F. McLaughlin

November 1, 1962—Judgment by Judge Charles F. McLaughlin

December 31, 1962—Notice of appeal

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1852 - '62

JAMES K. TALLMAN, 1132 H Street, Anchorage, Alaska; ALICE P. TALLMAN, 1132 H Street, Anchorage, Alaska; CHRISTINE FLEISCHER, Palmer, Alaska; WILLIAM O. RABOURN, c/o Bell, Sanders & Tallman, Box 1599, Anchorage, Alaska; HARRY B. COCKRUM, 3705 N. Massachusetts Avenue, Portland 17, Oregon; BAILEY E. BELL, 213 Central Building, Box 1599, Anchorage, Alaska; JAMES G. CARLSON, c/o William H. Sanders, Box 1599, Anchorage, Alaska; MICHAEL F. BEIRNE, 918—10th Avenue, Anchorage, Alaska; JAMES E. O'MALLEY, 213 Central Building, Box 1599, Anchorage, Alaska; and WALDO E. COYLE, Box 166, Kenai, Alaska, as individuals, PLAINTIFFS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, WASHINGTON, D. C., DEFENDANT

COMPLAINT FOR REVIEW, FOR DECLARATORY JUDGMENT, AND FOR INJUNCTIVE RELIEF—Filed June 8, 1962

The plaintiffs for their complaint represent as follows:

1. The plaintiffs are citizens of the United States and residents of the State of Alaska, except Harry B. Cockrum who is a resident of Oregon.

[fol. 2] 2. The defendant is the Secretary of the Interior of the United States and as such is charged with the administration of the laws relating to the public lands, including the Mineral Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, 30 U.S.C. § 181, et seq., as amended, and the Pickett Act of June 25, 1910, as amended, 43 U.S.C. §§ 141-142. The official residence of the defendant is the District of Columbia.

3. The matter in controversy, exclusive of interest and costs, exceeds $10,000.

4. The jurisdiction of the Court is invoked under Title 11, Section 306 of the District of Columbia Code; upon the ground of diversity of citizenship, and upon the further ground that the construction and interpretation of federal statutes, executive orders, and regulations are involved and required. Plaintiffs seek relief under the terms of section 10 of the Administrative Procedure Act of June 11, 1946, 60 Stat. 243, 5 U.S.C. § 1009, and under the terms of 28 U.S.C. §§ 2201 and 2202 relating to Declaratory Judgments. The Court has jurisdiction also by virtue of its inherent power to grant injunctive relief in the premises.

5. This case is concerned with the unlawful, unreasonable and arbitrary action of the defendant in failing and refusing to issue to each of the plaintiffs an oil and gas lease covering 2560 acres of public land in Alaska to which each of the plaintiffs, as a respective first qualified applicant therefor, is entitled under the statutes, executive order, and regulations hereinafter referred to, and under the decisions, rulings and declared policy of the Department of the Interior.

[fol. 3] 6. The land in suit embraces 2560 acres for each plaintiff, or a total of 25,600 acres, more or less, in the northern part of the Kenai National Moose Range. At all times herein material the 25,600 acres were public lands of the United States believed to contain oil and gas deposits and were not within any known geologic structure of a producing oil or gas field. The land in suit is more particularly described in Appendix A annexed hereto and made a part of this complaint.

7. Under the Act of August 8, 1946, section 3, 60 Stat. 951, 30 U.S.C. § 226, amendatory of the Mineral Leasing Act, the Secretary of the Interior is authorized to lease such oil and gas lands when open to leasing under the Mineral Leasing Act. The Act mandatorily requires that:

> ". . . When the lands to be leased are not within any known geological structure of a producing oil or gas field, *the person first making application for the lease* who is qualified to hold a lease under this Act

> shall *be entitled to a lease of such lands* without competitive bidding." (Emphasis supplied.)

Under the Act and long standing administrative decisions no application for an oil and gas lease under this section may be made of public lands reserved from oil and gas leasing, and a lease application for such closed lands grants the applicant no preference right over a subsequent applicant who submits the first application for the lands after the lands are open to oil and gas leasing.

8. The Kenai National Moose Reserve was established on December 16, 1941 by Executive Order No. 8979 (6 F. R. 6471) issued by President Franklin Delano Roose- [fol. 4] velt. The Executive Order provided that none of the lands within the Reserve, with certain exceptions,

> "shall be subject to settlement, location, sale or entry, or other disposition . . . under any of the public land laws applicable to Alaska . . ."

Executive Order No. 8979 establishing the Reserve was promulgated pursuant to the power of the President under the 1910 Pickett Act, *supra*, as well as his inherent power under the Constitution, to withdraw lands from leasing under the Mineral Leasing Act and other public land laws for purposes such as wildlife refuges.

9. By Executive Order No. 10355 of May 26, 1952 (17 F. R. 4831) the President delegated to the Secretary of the Interior his power

> ". . . to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, *including the authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made.*" (Emphasis supplied.)

Under Departmental Regulations (24 F. R. 1348, Departmental Manual, §§ 200.2.1, 210.1.1, 210.1.2, 210.2.2A(4)(a)) the Secretary of the Interior has redelegated the authority delegated to him by the President in Executive Order No. 10355 relating to the creation or revocation of reservations of public lands to the Under Secretary and

certain Assistant Secretaries but has expressly not redelegated this power to the Solicitor or Deputy Solicitor of the Department.

10. On July 24, 1958 (published in the Federal Register of August 2, 1958) the Secretary of the Interior issued an order (23 F. R. 5883) with respect to the Kenai Na- [fol. 5] tional Moose Reserve which expressly provided:

> "*Closed Area.* The following described lands within the boundaries of the Kenai National Moose Range, Alaska, *are not opened to oil and gas leasing:*" (Emphasis supplied.)

The lands listed as "not opened" were in the southern part of the Reserve. As to the lands in the northern part of the Reserve, wherein the 25,600 acres involved in the present action lay, the Order provided:

> ". . . lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office of the Bureau of Land Management in Anchorage, Alaska. All lease offers filed in that office on that day and until 10 A.M., on the tenth day thereafter will be treated as having been filed simultaneously. The priorities of all offers which conflict in whole or in part will be determined in accordance with the procedure outlines in the regulation 43CFR 295.8."

The "agreement and map" were noted on the records on August 4, 1958, so that the lands involved in this case first became open to lease offers on August 14, 1958. The July 24, 1958 order under which the lands were opened followed new regulations pertaining to wildlife lands in general (Circular 1990, 43 CFR 192.9, January 8, 1958) and a classification by the Secretary in January, 1958, (attached and made part hereto as Exhibit B) deciding that the northern part of the Kenai Moose Range "will be opened."

11. Plaintiffs duly filed their respective offers to lease on or after August 14, 1958 in accordance with the procedure specified in the Secretary's Order of July 24, 1958,

supra. Their applications were the first received by the [fol. 6] Bureau of Land Management after the lands had been opened by the Secretary for lease offers. On September 4, 1959 the Bureau of Land Management issued a "Notice of Public Drawing" to "determine priorities between simultaneously filed oil and gas lease offers," which specifically included plaintiffs' applications. A copy of this Notice is annexed as Exhibit C and made a part of this complaint. The drawing was held on September 14, 1959. Subsequent to the drawing, plaintiffs remained the first lease applicants for the respective lands applied for of those applicants filing after August 14, 1958.

12. However, in decisions dated October 1, 5 and 7, 1959, the Chief, Minerals Adjudication Unit, Anchorage Land Office, rejected the plaintiffs' lease offers for the reason that they conflicted with leases issued during the fall of 1958, based on offers filed on various dates between October 15, 1954 and January 28, 1955.

13. Plaintiffs duly appealed to the Director of the Bureau of Land Management in accordance with the Department's rules of practice. By decisions by the Director and Acting Director dated July 21, 1960, July 15, 1960 and July 15, 1960, respectively, the decisions by the Chief of the Minerals Adjudication Unit, Anchorage was affirmed. The Director and Acting Director in rejecting plaintiffs' appeal stated that the lands involved were "opened to leasing within the Kenai National Moose Range, Alaska" pursuant to Circular 1990 of January 8, 1958. (See paragraph 10, supra.) Copies of these decisions are annexed as Exhibit D and made a part of this complaint.

[fol. 7] 14. Thereafter plaintiffs duly appealed to the Secretary of the Interior in accordance with the Department's rules of practice. The Secretary of Interior never acted upon the appeals. Instead a Deputy Solicitor of the Department of the Interior in an opinion dated September 1, 1961 rejected plaintiffs' appeals on different grounds from those asserted by the Director and Acting Director of the Bureau of Land Management. The Deputy Solicitor concluded that the lands within the Kenai National Moose Reserve withdrawn by Executive Order No.

8979 of December 16, 1941 were open to oil and gas leasing during 1954 and 1955 when the offers were filed upon which leases were issued in September 1958, because "nothing in the withdrawal specifically excludes those lands from the scope of the act." (A copy is attached as Exhibit E and made a part of this complaint.) Under Departmental Regulations discussed *supra*, paragraph 9, the Deputy Solicitor had no authority to open the Reserve. Plaintiffs' appeals to the Secretary of the Interior for the issuance of leases could have been rejected by the Deputy Solicitor for the Secretary only if the Kenai National Moose Range had been validly opened by the President or Secretary of the Interior to oil and gas leasing in 1954 and 1955.

15. Subsequent to the opinion of the Deputy Solicitor, plaintiffs undertook an investigation of the matters therein for the first time cited. As a result thereof, plaintiffs then, pursuant to Departmental procedures, duly filed a petition for exercise of supervisory authority with the defendant Secretary of the Interior on the grounds (1) [fol. 8] that newly discovered evidence from National Archives reveals that it was the intent of President Roosevelt in establishing the Kenai National Moose Reserve by Executive Order in 1941 that it be closed to leasing under the Mineral Leasing Act; (2) that the Deputy Solicitor lacked authority to decide plaintiffs appeals to the Secretary; and (3) that the Deputy Solicitor's purported decision conflicts with other decisions by Assistant Secretaries and other officials within the Department—a conflict which only the Secretary could resolve. A copy of plaintiffs' petition is attached hereto as Exhibit F as part of this complaint. In a decision dated April 25, 1962, again signed by the same Deputy Solicitor, plaintiffs' petition for exercise of supervisory authority, although allegedly considered on its merits, was denied. A copy of the decision of April 25, 1962 is attached hereto as Exhibit G as part of this complaint.

16. Plaintiffs have exhausted their administrative remedies.

17. The refusal of the defendant Secretary of the Interior to grant plaintiffs' petition for exercise of fuper-

visory authority, thereby rejecting plaintiffs' lease offers and refusing to issue noncompetitive oil and gas leases to plaintiffs as the first qualified applicants is unlawful, arbitrary, unreasonable and discriminatory, is in violation of the express and mandatory provisions of the Mineral Leasing Act of 1920, as amended, the Picket Act of 1910, as amended, and the applicable Executive Orders and regulations, and is contrary to the decisions, rulings and established administrative practice of the Department of the Interior. The unlawful and improper actions of the defendant herein complained of are particularized as follows:

[fol. 9] (1) In failing to rule that the new evidence from National Archives shows that the 1941 Executive Order establishing the Kenai National Moose Reserve closed the Reserve to oil and gas leasing offers until opened by the Secretary in his order issued July 24, 1958, although the decisions cited by the Deputy Solicitor in his opinion of September 1, 1961 relied upon such evidence in relation to established judicial construction of such orders, in deciding that the Reserve was previously open in 1954 and 1955.

(2) In refusing to recognize his own regulations and controlling law which grant no authority to a Deputy Solicitor to modify or revoke the Executive Order of 1941 establishing the Kenai National Moose Reserve so as to retroactively declare the Reserve open to oil and gas lease offers in 1954 and 1955 as a basis for the rejection of plaintiffs' lease offers made in August, 1958. As a consequency the Deputy Solicitor had no authority to decide plaintiffs' appeals to the Secretary.

(3) In failing to correct the purported opinion of the Deputy Solicitor rejecting plaintiffs' appeals which conflicted with other decisions by Departmental officials.

WHEREFORE, plaintiffs pray:

1. That the Court review the action of the defendant in accordance with the provisions of section 10 of the Administrative Procedure Act (5 U.S.C. § 1009);

[fol. 10] 2. That it be declared and adjudged that the defendant violated the provisions of the Mineral Leasing Act, the Pickett Act, and the applicable Executive Orders and Departmental regulations in refusing to grant plaintiffs' petition for exercise of supervisory authority and thereby ruling that the Kenai National Moose Reserve was open to oil and gas lease offers in 1954 and 1955 before opened by Order of the Secretary of July 24, 1958, published in the Federal Register of August 2, 1958;

3. That it be declared and adjudged that the Deputy Solicitor of the Department lacked authority to declare the Kenai National Moose Reserve open to oil and gas leases in 1954 and 1955, and lacking such authority could not validly decide and reject plaintiffs' appeals to the Secretary for the issuance of leases to them as the first qualified applicants;

4. That it be declared and adjudged that defendant violated section 17 of the Mineral Leasing Act of 1920 as amended in rejecting plaintiffs' lease offers.

5. That the defendant be directed to reinstate plaintiffs' lease offers and to issue noncompetitive oil and gas leases to plaintiffs as the first qualified applicants if their lease offers are otherwise regular and complete; or in the alternative that the defendant be directed to decide plaintiffs' appeals;

6. That the defendant pay to the plaintiffs the costs of this action;

[fol. 11] 7. That the plaintiffs have such other and further relief as is just and equitable.

/s/

CHARLES F. WHEATLEY, JR.
1203 Walker Building
Washington 5, D. C.

[*Duly sworn to by Charles F. Wheatley, Jr. jurat omitted in printing*]

[fol. 12]

EXHIBIT A TO COMPLAINT

OIL AND GAS LEASE APPEALS

JAMES K. TALLMAN—Anchorage 044843—2560 acres

Territory of Alaska—T. 6N, R9W, Seward Meridian

Beginning at the Northeast Corner of Section 1, Township 5 North, Range 9 West, of the Seward, Meridian, Third Judicial Division of Alaska, thence running true North a distance of two miles (10560′), thence West a distance of two miles (10560′), thence South a distance of two miles (10560′), thence East two miles (10560′) to the place of beginning. The approximate legal subdivisions of said tract being Sections 25, 26, 35 and 36, Township Six North (T6N), Range Nine West (R9W), of the Seward Meridian, if and when surveyed.

ALICE P. TALLMAN—Anchorage 044844—2560 acres

Territory of Alaska—T6N, R10W, Seward Meridian

Beginning at the Northeast Corner of Section 1, Township 5 North, Range 10 West, of the Seward Meridian, Third Judicial Division of Alaska, thence running true North a distance of two miles (10560′), thence West a distance of two miles (10560′), thence South a distance of two miles (10560′), thence East two miles (10560′), to the place of beginning. The approximate legal subdivisions of said tract being Sections 25, 26, 35 and 36, Township Six North (T6N), Range 10 West, (R10W), of the Seward Meridian, if and when surveyed.

CHRISTINE FLEISCHER—Anchorage 044842—2560 acres

Territory of Alaska—T6N, R9W, Seward Meridian

Commencing at the Northeast Corner of Section 1, Township 5 North, Range 9 West, of the Seward

Meridian, Third Judicial Division of Alaska, thence running true North a distance of four miles (21120') to the true point of beginning, thence West a distance of two miles (10560') thence North 2 miles (10560') thence East a distance of two miles (10560'), thence South two miles (10560') to the point of beginning. The approximate lagel subdivsions of said tract being Sections 1,2, 11 and 12, Township Six North, Range 9 West, of the Seward Meridian, if and when surveyed.

[fol. 13]

WILLIAM O. RABOURN—Anchorage 044845—2560 acres

Territory of Alaska—T6N, R9W, Seward Meridian

Commencing at the Northeast Corner of Section 1, Township 5 North, Range 9 West of the Seward Meridian, Third Judicial Division of Alaska, thence running true North a distance of 2 miles (10560') to the true point of beginning, thence West a distance of 2 miles (10560'), thence North a distance of 2 miles (10560'), thence East 2 miles (10560'), thence South 2 miles (10560') to the point of beginning. The approximate legal subdivisions of said tract being Sections 13, 14, 23 and 24, Township 6 North, Range 9 West of the Seward Meridian, if and when surveyed.

HARRY B. COCKRUM—Anchorage 044846—2560 acres

Territory of Alaska—T6N, R9W, Seward Meridian

Commencing at the Northeast Corner of Section 1, Township 5 North, Range 9 West of the Seward Meridian, Third Judicial Division of Alaska, thence West two miles (10560') to the true point of beginning, thence North two Miles (10560'), thence West two miles (10560'), thence South two miles (10560'), thence East two miles (10560') to the point of beginning. The approximate legal subdivisions of said tract being Sections 27,28, 33 and 34, Township 6 North, Range 9 West, of the Seward Meridian, if and when surveyed.

BAILEY E. BELL—Anchorage 044847—2560 acres

Territory of Alaska—R6N, R9W, Seward Meridian

Commencing at the NE Corner of Section 1, Township 5 North, Range 9 West of the Seward Meridian, Third Judicial Division of Alaska, thence running West a distance of 4 miles (21120′) to the true point of beginning, thence North 2 miles (10560′), thence West 2 miles (10560′), thence South 2 miles (10560′), thence East 2 miles (10560′) to the point of beginning. The approximate legal subdivisions of said tract being Sections 29,30,31 and 32, T6N, R9W, of the Seward Meridian, if and when surveyed.

[fol. 14]

JAMES G. CARLSON—Anchorage 044848—2560 acres

Territory of Alaska—T6N, R9W, Seward Meridian

Commencing at the Northeast Corner of Section 1, Township 5 North, Range 9 West, of the Seward Meridian, Third Judicial Division of Alaska, thence running West two miles (10560′), thence North four miles (21120′), to the true point of beginning, thence west two miles (10560′), thence North two miles (10560′), thence East two miles (10560′), thence South two miles (10560′), to the point of beginning. The approximate legal subdivisions of said tract being Sections 3, 4, 9 and 10, Township 6 North, Range 9 West of the Seward Meridian, if and when surveyed.

MICHAEL F. BEIRNE—Anchorage 044849—2560 acres

Commencing at the Northeast Corner of Sec. 1, Twsp. 5 N, Range 9 W, of the Seward Meridian, Third Judicial Division of Alaska, thence running West a distance of 4 miles (21120′), thence North 2 miles (10560′) to the true point of beginning, thence West 2 miles (10560′), thence North 2 miles (10560′) thence East 2 miles (10560′), thence South 2 miles (10560′) to the point of beginning. The approxi-

mate legal subdivisions of said tract being Sections 17, 18, 19 and 20, T6N, R9W of the Seward Meridian, if and when surveyed.

JAMES E. O'MALLEY—Anchorage 044850—2560 acres

Territory of Alaska—T6N, R9W, Seward Meridian

Commencing at the Northeast Corner of Sec. 1, Twsp. 5 North, Range 9 West of the Seward Meridian, Third Judicial Division of Alaska, thence running West a distance of 4 miles (21120'), thence North 4 miles (21120'), to the true point of beginning, thence West two miles (10560'), thence North 2 miles (10560'), thence East 2 miles (10560'), thence South 2 miles (10560') to the point of beginning. The approximate legal subdivisions of said tract being all of Sections 5, 6, 7 and 8 of Twsp. 6 N, Range 9 W, of the Seward Meridian, if and when surveyed.

[fol. 15]

WALDO E. COYLE—Anchorage 045178—2400.81 acres

Alaska—T5N, R11W, Seward Meridian

Sec. 9 Lots 3, 4, 5, 6 & NE-¼ SW-¼ S-½NE-¼, S-½SW-¼, SE-¼

Sec. 10, N-½NE-¼, SE-¼, SE¼, Lots 4,5,6,8,9,10,11

Sec. 11, Lots 1 thru 9 and N½ NW-¼, SE-¼ SW-¼ W-½ NE-¼. NE-¼SE-¼, E-½ SW-¼

Sec. 14, Lots 1 thru 7, 9, 10, 12

Sec. 16, Lots 1 thru 10, NW-¼NW-¼, SE¼ SW-¼

Sec. 18, SW-¼SE-¼, E-½ SE-¼

Sec. 19, Lots 7, 8, 9, 11, 13 and SE-¼ NE-¼ SE-¼

Sec. 36, Lots 1 thru 8 and SW-¼ SE-¼

[fol. 16] EXHIBIT B TO COMPLAINT

[SEAL]

DEPARTMENT OF THE INTERIOR

Information Service

STATEMENT BY SECRETARY OF THE INTERIOR FRED A. SEATON ON OIL AND GAS LEASING ON THE KENAI MOOSE RANGE, ALASKA, JANUARY 29, 1958

I have approved this week a classification of the Kenai Moose Range in the Territory of Alaska which delineates those areas which will be opened and closed to development. The closed section—about 1,689 square miles—includes all areas on which the Fish and Wildlife Service believes oil and gas development would be incompatible with wildlife management purposes.

In those areas of the Kenai Moose Range open to oil and gas leasing—about 1,525 square miles—operations will be subject to stipulations which provide maximum protection for fish and wildlife.

The lands open to leasing lie primarily north of the Sterling Highway and include the current oil-producing area and two proposed new unit areas. Also included in the open areas will be the Swanson River Valley, lands around the towns of Kenai and Kasilof, and the Soldonata area. All good spawning and rearing areas for salmon will be protected, and important waterfowl areas will be preserved. Also, because of its scenic beauty, an area at Bedlam Lake will be closed.

I am assured by Assistant Secretary Leffler that this action opening a portion of the Kenai range subject to the proposed regulated development is entirely consistent with the p imary purpose for which the range is managed.

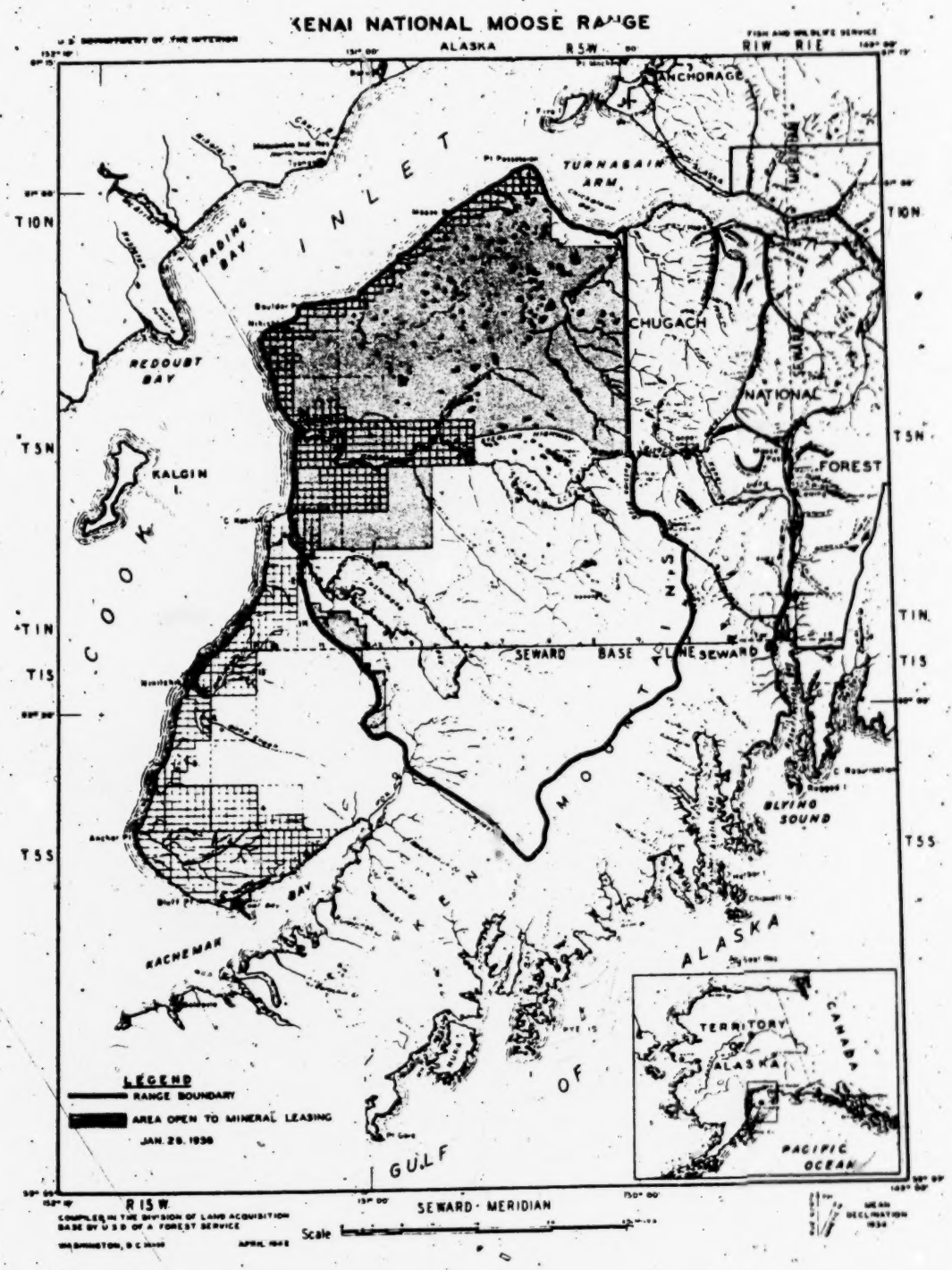
A map showing the locations of the open and closed areas is attached.

As of today no classifications of other areas have been completed. The Fish and Wildlife Service, the Bureau of Land Management and the Geological Survey, as I ad-

vised you at our last press conference, are proceeding as rapidly as possible on classification procedures for other wildlife lands.

When the classification procedures have been completed and approved, they will be sent to the field personnel of the Fish and Wildlife Service, the Bureau of Land Management, and the Geological Survey. We will seek a speedy, but thorough, classification. It will be made initially by employees who know land and wildlife values, assisted by technicians who can judge properly the possibility of mineral occurrences. The final decision in all classifications, of course, rests with the Secretary of the Interior.

[fol. 17]


KENAI NATIONAL MOOSE RANGE
ALASKA
ANCHORAGE
TURNAGAIN ARM
INLET
TRADING BAY
REDOUBT BAY
CHUGACH
NATIONAL
FOREST
KALGIN I.
COOK
SEWARD BASE LINE
SEWARD
BLYING SOUND
KACHEMAK BAY
GULF OF ALASKA
TERRITORY
ALASKA
CANADA
PACIFIC OCEAN
T10N
T9N
T8N
T7N
T6N
T5S
R5W
R4W
R3W
R2E
R1E
SEWARD MERIDIAN
LEGEND
RANGE BOUNDARY
AREA OPEN TO MINERAL LEASING
JAN. 28, 1936
Scale

[fol. 18] EXHIBIT C TO COMPLAINT

In Reply Refer To:
ALO:M4

[SEAL]

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Land Office
334 E. Fifth Avenue
Anchorage, Alaska

September 4, 1959

NOTICE OF PUBLIC DRAWING

Horace C. Allen, Jr., et al.
Anchorage 045221, et al.
Oil & Gas

Numerous oil and gas lease offers[1] were filed during the simultaneous period established in accordance with the agreement classifying the lands in the Kenai National Moose Range, Alaska, for oil and gas leasing purposes, pursuant to the regulations, 43 CFR 192.9 (Circular 1990), approved by the Secretary on January 8, 1958.

43 CFR 192.9(b)(3) and (c) state in pertinent part as follows:

> "Lease offers for such lands will not be accepted for filing until the tenth day after the agreements and supplemental maps or plats are noted on the land office records."

The records were noted August 4, 1958, therefore, all offers filed for these lands on or after 10:00 A.M., August 14, 1958 and until and including 10:00 A.M. on the tenth day thereafter, which in this instance must be Monday,

[1] The names & address of the offerors and serial numbers of their respective oil & gas lease offers appear in Appendix "A", attached hereto.

August 25, 1958, as the land office was not open Sunday. August 24, 1958, are considered as simultaneously filed.

A public drawing is required to determine priorities between simultaneously filed oil and gas lease offers, therefore, such a drawing will be held involving the oil and gas offers in question [1] at the Anchorage Land Office, 334 E. Fifth Avenue, Anchorage, Alaska, in accordance with the governing regulations, 43 CFR 295.8(c), at 2:00 P.M., September 14, 1959.

A defective oil and gas lease offer will not afford the offeror priority until the defect is cured, therefore, the public drawing will be held to establish priority for issuance of leases and will in no way validate a defective application when the offer is reached for adjudication.

No notice of the results of this drawing will be mailed to the offerors listed. However, a tabulation indicating the established priority awarded will be posted on the bulletin board of the Anchorage Land Office and will remain posted for thirty days from the date of the drawing.

/s/ Irving W. Anderson
IRVING W. ANDERSON
Manager

[fol. 19] APPENDIX "A"

Name & Address	Serial Number
Horace C. Allen, Jr. 971 Tucson Aurora, Colorado	Anchorage 045221
James D. Alderman 3990 Otis Wheatridge, Colorado	Anchorage 045201
Bailey E. Bell 213 Central Building, Box 1599 Anchorage, Alaska	Anchorage 044847
Dr. Michael F. Beirne 918 - 10th Avenue Anchorage, Alaska	Anchorage 044849
John H. Brunel 2985 Reed Street Denver 15, Colorado	Anchorage 045217
J.M. Bryan 10 Requa Place Piedmont, California	Anchorage 045245, 045246, 045247, 045248, 045249, 045251, 045252, 045253, 045254, 045255, 045256, 045257, 045258, 045259, 045260, 045261, 045262, 045263, 045264
James G. Carlson c/o William H. Sanders Box 1599 Anchorage, Alaska	Anchorage 044848
Donald D. Church RFD Wasilla, Alaska	Anchorage 044968, 044969
O. Etola Cochran 3531 Cortez Drive Dallas 20, Texas	Anchorage 045163
Dale R. Cochran 3531 Cortez Drive Dallas 20, Texas	Anchorage 045164, 045165

[fol. 20]

Name & Address	Serial Number
Thelma E. Cochran 3531 Cortez Drive Dallas 20, Texas	Anchorage 045166
James E. Cochran 3531 Cortez Drive Dallas 20, Texas	Anchorage 045167
Harry B. Cockrum 3705 N. Massachusetts Avenue Portland 17, Oregon	Anchorage 044846
Waldo E. Coyle Box 166 Kenai, Alaska	Anchorage 045169, 045170, 045171, 045172*, 045174, 045175, 045176, 045177, 045178
Jaye F. Dyer 9230 West 9th Denver 15, Colorado	Anchorage 045216
Sal Eisenberg 636 N. La Brea Avenue Los Angeles, California	Anchorage 045098, 045100*, 045124, 045149
Jean Erickson 726 K. Street Anchorage, Alaska	Anchorage 045369, 045370, 045371, 045372, 045373, 045374, 045375, 045376, 045377, 045378, 045379*, 045380, 045381, 045382, 045383
Anthony Evanco Box 1545 Anchorage, Alaska	Anchorage 045059, 045060, 045061, 045062
Mrs. Christine Fleischer Palmer, Alaska	Anchorage 044842
H. Roland Glaiser & Alfred V. Hagen Westward Hotel Anchorage, Alaska	Anchorage 045279, 045280, 045281, 045282, 045283
Harry G. Gadlove P. O. Box 1091 Anchorage, Alaska	Anchorage 044978

Name & Address	Serial Number
Maurice Mac Goodstein 405 N. Palm Drive Beverly Hills, California	Anchorage 045086, 045113*, 045132, 045136, 045137, 045148
[fol. 21]	
Jane Goodstein 405 N. Palm Drive Beverly Hills, California	Anchorage 045090, 045109 045112
W. Pershing Grace 2095 Oakland Aurora, Colorado	Anchorage 045223
L. E. Grammer Box 787 Anchorage, Alaska	Anchorage 044851, 044852, 044853, 044854
Virginia Gratias Box 843 Anchorage, Alaska	Anchorage 045181
W. H. Gregory & Alfred V. Hagen Box 38 Anchorage, Alaska	Anchorage 045160
Rose Haimes 612 S. Hauser Los Angeles, California	Anchorage 045125, 045127
Charles M. Heard 2555 Cody Court Denver 15, Colorado	Anchorage 045220, 045228
R. A. Hildebrand Box 1648 Grand Junction, Colorado	Anchorage 045051, 045154
Sam Joseph 178 N. Clark Beverly Hills, California	Anchorage 045118, 045122 045139, 045140
Harold Koslosky 810 M Street Anchorage, Alaska	Anchorage 045349, 045350
Henry H. Knackstedt Box 52 Kenai, Alaska	Anchorage 045179, 045180
C. V. Lindorff 2420 S. Ogden Street Denver 10, Colorado	Anchorage 045219, 045227

Name & Address	Serial Number
Don R. Link 841 Petroleum Club Building Denver, Colorado	Anchorage 045192

[fol. 22]

J. R. Mann 1312 Bank of the Southwest Building Houston 2, Texas	Anchorage 044945
Glen S. Miller 112 W. Ray Street Seattle 99, Washington	Anchorage 045285
Robert A. Moffett 7720 Brookmill Road Downey, California	Anchorage 045105, 045107, 045145, 045146
Clarabell Murdock 1388 S. Zuni Denver 23, Colorado	Anchorage 045182, 045186, 045190*, 045198
Vera G. Nelson 620 D. Street Anchorage, Alaska	Anchorage 045157
Lawrence W. Nelson Alfred V. Hagen Box 1561 Anchorage, Alaska	Anchorage 045367
Newton H. Neustadter, Jr. 60 Sea Cliff Avenue San Francisco, California	Anchorage 045053, 045054, 045055, 045056, 045058
Ohio Oil Company 550 S. Flower Street Los Angeles 17, California	Anchorage 044986, 044987, 044988, 044989, 044990, 044991
James E. O'Malley 213 Central Building, Box 1599 Anchorage, Alaska	Anchorage 044850
George Orling 232 No. Almont Beverly Hills, California	Anchorage 045099, 045103
Sanford Orling 178 N. Clark Beverly Hills, California	Anchorage 045143, 045144

Name & Address	Serial Number
C. A. Patchen 3459 S. Fairfax Denver 22, Colorado	Anchorage 045218
Glenn R. Penland Box 1753 Anchorage, Alaska	Anchorage 045361, 045362, 045363, 045364
[fol. 23]	
Pexco Inc. 155 Montgomery Street San Francisco, California	Anchorage 045230*, 045231, 045233, 045234, 045235, 045236, 045237, 045238, 045240, 045241, 045242, 045244 045243*
Howard K. Phillips 1115 First National Bank Building Denver 2, Colorado	Anchorage 045225
Harry J. Pursell Box 320 Anchorage, Alaska	Anchorage 045310
William O. Rabourn c/o Bell, Sanders & Tallman Box 1599 Anchorage, Alaska	Anchorage 044845
Alva D. Saxton Alfred V. Hagen Box 1847 Palmer, Alaska	Anchorage 045161
Charles Schraier 3036 Watseka Avenue Los Angeles, California	Anchorage 045087, 045097
John I. Schumacher Box 1648 Grand Junction, Colorado	Anchorage 045052, 045064, 045065, 045066
Roy S. Scott, Jr. 1115 1st National Bank Building Denver 2, Colorado	Anchorage 045224
Adele Silverman 2657 S. Bedford Los Angeles, California	Anchorage 045123, 045133, 045135, 045151

Name & Address	Serial Number
Floyd D. Smith Box 66 Wasilla, Alaska	Anchorage 044981, 044982, 044983, 044984
Betty J. Spelta 2207 Alder Cir. Drive Anchorage, Alaska	Anchorage 045286
Burl C. Stephens, Jr. P. O. Box 2083 Anchorage, Alaska	Anchorage 045295
[fol. 24]	
Mrs. Sue Stricklett 11739 Hortense North Hollywood, California	Anchorage 045089, 045092, 045119, 045128
James C. Stricklett 11739 Hortense North Hollywood, California	Anchorage 045091*, 045111, 045119, 045128
James K. Tallman 1132 H Street Anchorage, Alaska	Anchorage 044843
Alice P. Tallman 1132 H Street Anchorage, Alaska	Anchorage 044844
Robert F. Thurrell, Jr. 239 S. Dohlia Street Denver 22, Colorado	Anchorage 044874, 044785, 044876, 044879, 044880, 045185, 045187, 045188, 045193, 045194, 045195, 045197
Frank P. Turner 2585 South Newton Denver 19, Colorado	Anchorage 045222
Union Oil Co. of California Union Oil Center P. O. Box 7690 Los Angeles 54, California	Anchorage 045204, 045205, 045206, 045207, 045208, 045209*, 045210, 045211
Viola M. Vermillion 4311 LaMont Circle Bellaire, Texas	Anchorage 044941, 044942, 044943, 044944

Name & Address	Serial Number
Jack V. Walker Box 2256 Anchorage, Alaska	Anchorage 045158
John E. Walters 8814 Winningham Houston 24, Texas	Anchorage 044948, 044949, 044950, 044951
Louis L. Watson 739 Revere Aurora, Colorado	Anchorage 045183, 045184, 045196, 045199
T. Stanton Wilson Box 1753 Anchorage, Alaska	Anchorage 045351, 045352, 045353, 045354, 045355, 045356, 045357, 045358, 045359

Asterisk (*) indicates only a portion of offer within Executive Order 8979 to be considered in simultaneous drawing.

[fol. 25] EXHIBIT D TO COMPLAINT

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
Anchorage 044843
044844
5.04g

July 15, 1960

Certified Mail
Return Receipt Requested

DECISION

James K. Tallman
Alice P. Tallman

Oil and Gas

Decisions Affirmed

The above named parties have appealed from separate decisions of the Chief, Minerals Adjudication Unit, Anchorage Land Office, date October 7, 1959, which rejected oil and gas lease offers Anchorage 044843 and 044844 filed August 14, 1958, under the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226). The offers for unsurveyed lands in areas open to leasing within the Kenai National Moose Range, Alaska (Circular 1990, 43 CFR 192.9(d)) were rejected for the reason that the lands are embraced in leases Anchorage 028080 and 028082 issued effective September 1, 1958, pursuant to prior filed offers pending on January 10, 1958 (43 CFR 192.9(d) and (e)). The decisions stated that the issued leases embrace the nontidal navigable waters within their exterior boundaries pursuant to timely exercised preference rights granted by section 6 of the Act of July 3, 1958 (Public Law 85-505; 72 Stat. 322) and the appellants' offers to this extent were also rejected.

The appellants contend that Anchorage 028030 and 028082 are an absolute nullity because the offers were filed prior to the opening of the lands to leasing. They also state that the leases having issued for 25 cents an acre while their offers were filed for 50 cents an acre was arbitrary, willful and intentional give away of public property and the leases should be rescinded.

The records verify the status of the lands as determined by the Chief, Minerals Adjudication Unit, and his application of the revised regulation cited and his interpretation of it were correct. The leases having issued properly, it was proper to reject the appellants' offers for the reasons stated. The appellants' contentions to the contrary are not meritorious including the contention concerning the lower rental of 25 cents an acre as being arbitrary. Section 10 of the Act of July 3, 1958 (72 Stat. 322) expressly provides that a rental rate of 25 cents per acre for the first lease year is applicable to all leases issued pursuant to lease applications or offers pending on May 3, 1958. See *Solicitor's Opinion*, M-36523 (August 1, 1958). The first year rental rate of 50 cents per acre is required with respect to all offers filed on or after May 3, 1958. *J.W. Bauler et al.*, 66 I.D. 377 (1959).

[fol. 26] Accordingly, the decisions of the Chief, Minerals Adjudication Unit, rejecting the appellants' offer were proper and are hereby affirmed.

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00 in each case. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken by Alice P. Tallman then the adverse party to be served is:

Hal W. Stewart
306 East McPherson
Findlay, Ohio

If an appeal is taken by James K. Tallman then the adverse party to be served is:

D. J. Griffin
221 E. Lincoln Street
Findlay, Ohio

/s/ Earl J. Thomas
Acting Director

Enclosure

DISTRIBUTION:

Mr. James K. Tallman (Certified Mail)
Mrs. Alice P. Tallman (Certified Mail)
Mr. Hal W. Stewart (Regular Mail)
Mr. D. J. Griffin (Regular Mail)
Minerals Staff Officer (3)
Geological Survey (3)
Appeals List No. 1
WJ

76861-60

[fol. 27]

In reply refer to:
Anchorage 044842 and
044845 through 044850
5.04g

July 21, 1960

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Certified Mail
Return Receipt Requested

DECISION

Christine Fleischer
William O. Rabourn
Harry B. Cockrum
Bailey E. Bell
James A. Carlson
Michael F. Beirne
James E. O'Malley

Oil and Gas

Decisions Affirmed

The above-named parties appealed from separate decisions of the Chief, Minerals Adjudication Unit, Anchorage Land Office, dated October 1 and 5, 1959, which rejected the above-noted oil and gas lease offers, filed August 14, 1958, under the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226). The offers for unsurveyed lands in the areas opened to leasing within the Kenai National Moose Range, Alaska (Circular 1990, 43 CFR 192.9(d)) were rejected for the reason that the lands applied for are embraced in leases[1] (listed) which issued pursuant to prior filed offers pending on January 10,

[1] Anchorage 044848 held to be in conflict with 028988 is corrected to show the conflict is with Anchorage 028983—the records further show that Anchorage 028986 and 028991 were partly segregated into Anchorage 051421 and 051423, respectively.

1958 (43 CFR 192.9(d) and (e). The decisions stated further that the leases embraced the non-tidal navigable waters within their exterior boundaries pursuant to timely exercised peference rights granted by section 6 of the act of July 3, 1958 (Public Law 85-505; 72 Stat. 322), and the appellants offers to this extent were also rejected.

The appellants do not dispute the facts, however, they contend, in effect, that the issued leases are an absolute nullity because the offers were filed prior to the opening of the land within the Kenai National Moose Range to [fol. 28] leasing. Furthermore, the leases issued for 25 cents an acre while the appellants offers were filed for 50 cents an acre was an arbitrary, wilful and intentional giveaway of public property and the leases should be considered void.

The records verify the status of the lands as determined by the Chief, Minerals Adjudication Unit, and his application of the revised regulation cited and his interpretation of it were correct. The leases having issued properly, it was proper to reject the appellants offers for the reason stated. The appellants contentions to the contrary are not meritorius including the contention concerning the lower rental of 25 cents an acre as being arbitrary. Section 10 of the act of July 3, 1958 (72 Stat. 322) expressly provides that rental of 25 cents per acre for the first lease year is applicable to all leases issued pursuant to lease applications or offers filed prior to and pending on May 3, 1958. See *Solicitor's Opinion*, M-36523 (August 1, 1958).[1]

Accordingly, the decisions of the Chief, Minerals Adjudication Unit, rejecting the offers were proper and they are hereby affirmed.

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the

[1] The 50 cent per acre rental applies to all lease offers filed on or after May 3, 1958. *J. W. Bauler et al.*, 66 I.D. 377 (1959).

filing fee will be computed on the basis of $5 for *each* lease offer included in the appeal. If the appeal covers all offers adversely affected by this decision the total filing fee is $35. In taking an appeal there must be strict compliance with the regulations.

In the event an appeal is taken by the appellant listed then the adverse party or parties shown opposite the appellant's name must be served:

Appellant	Party to be served
Christine Fleischer (Anchorage 044842)	Fred W. Axford (Anchorage 028986 & Anchorage 051421) 12368 North Melody Lane Los Altos Hills, California
William O. Rabourn (Anchorage 044845)	Fred W. Axford (Anchorage 029000) (Same address as above)
Harry B. Cockrum (Anchorage 044846)	ɔris L. Erwin, Trustee (Anchorage 028150) 525 3rd Avenue Anchorage, Alaska

[fol. 29]

Bailey E. Bell (Anchorage 044847)	W. B. Emery II (Anchorage 028081) 4418 Frazier Avenue Bakersfield, California
James G. Carlson (Anchorage 044848)	Fred W. Axford (Anchorage 028983) 12368 North Melody Lane Los Altos Hills, California
Michael F. Beirne, M.D. (Anchorage 044849)	Fred W. Axford (Anchorage 028991 & 051423) (Same address as above)
	Michael T. Halbouty (Anchorage 028953, 028955) 5111 Westheimer Road Houston, Texas
	King Oil, Inc. (Anchorage 028953, 028955) 620 Oil and Gas Building Wichita Falls, Texas

Appellant	Party to be served
James E. O'Malley (Anchorage 044850)	Fred W. Axford (Anchorage 029001, 028991, 051423) (Same address as above)

/s/ Edward Woozley
Director

Enclosures

DISTRIBUTION:

James K. Tallman, Attorney for the appellants (Certified Mail)
Mrs. Christine Fleischer (Regular Mail)
William O. Rabourn (Regular Mail)
Harry B. Cockrum (Regular Mail)
Bailey E. Bell (Regular Mail)
James G. Carlson (Regular Mail)
Michael F. Beirne (Regular Mail)
James E. O'Malley (Regular Mail)
Minerals Staff Officer (3)
Geological Survey (3)
Appeals List No. 1
WJ

76861-60

[fol. 30]

In reply refer to:
Anchorage 045178
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

July 15, 1960

Certified Mail
Return Receipt Requested

DECISION

Waldo E. Coyle — Oil and Gas

Decision Affirmed

Mr. Waldo E. Coyle has appealed from a decision of the Chief, Minerals Adjudication Unit, Anchorage Land Office, dated October 13, 1959, which rejected oil and gas lease offer Anchorage 045178 filed August 22, 1958,[1] as to those lands applied for in the areas opened to leasing within the Kenai National Moose Range, Alaska, (Circular 1990, 43 CFR 192.9(d) held to be in conflict with leases Anchorage 028103, 028138, 028140, 045643 and 046693 which issued pursuant to prior filed offers pending on January 10, 1958 (43 CFR 192.9(d) and (e)).

In his appeal, appellant does not dispute the facts, however, he contends in effect that the issued leases are an absolute nullity because the offers therein were filed prior to the opening of the land within the Kenai National Moose Range to leasing. Furthermore, the leases having issued for 25 cents an acre while his offer was filed for 50 cents an acre was an arbitrary, wilful and intentional give away of public property and the leases should be considered void.

---

[1] Under the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226).

The records verify the status of the lands as determined by the Chief, Minerals Adjudication Unit, and his application of the revised regulation cited and his interpretation of it were correct. The leases having issued properly, it was proper to reject the offer for the reasons stated. The appellants contentions to the contrary are not meritorious including the contention concerning the lower rental of 25 cents an acre as being arbitrary. Section 10 of the Act of July 3, 1958 (72 Stat. 322) expressly provides that rental of 25 cents per acre for the first lease year is applicable to all leases issued pursuant to lease applications or offers pending on May 3, 1958. See *Solicitor's Opinion*, M-36523 (August 1, 1958). The 50 cents per acre rental is required with respect to all offers filed on or after May 3, 1958. J. W. Bauler et al., 66 I.D. 377 (1959).

[fol. 31] Accordingly, the decision of the Chief, Minerals Adjudication Unit, rejecting the offer for the aforementioned reasons was proper and it is hereby affirmed.

Mr. Coyle is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of $5.00. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken by Mr. Coyle thea the adverse parties to be served are:

Estate of E. Wells Ervin
C/o Doris L. Ervin
Arnell & Burr Law Office
204 Turnagain Arms
Anchorage, Alaska

M. B. Kirkpatrick
525 3rd Ave.
Anchorage, Alaska

/s/ Earl J. Thomas
Acting Director

Enclosure

DISTRIBUTION:

James K. Tallman, Bell, Sanders & Tallman, Attorneys at Law (Certified Mail)
Mr. Waldo E. Coyle (Regular Mail)
Mr. D. A. Burr, Arnell & Burr, Attorneys at Law (Regular Mail)
Estate of E. Wells Ervin (Regular Mail)
M. B. Kirkpatrick (Regular Mail)
Minerals Staff Officer (3)
Geological Survey (3)
Appeals List No. 1
WJ

76861-60

[fol. 32] EXHIBIT E TO COMPLAINT

97839-61

JAMES K. TALLMAN ET AL

A-28594
A-28609
A-28619

Decided September 1, 1961

Oil and Gas Leases: Lands Subject to—Wildlife Refuges and Projects—Withdrawals and Reservations: Effect of

Public land withdrawn for the protection of wildlife is not thereby removed from the operation of the Mineral Leasing Act and, in the absence of affirmative action by the Department closing the area to oil and gas leasing, offers to lease the land for oil and gas purposes may be filed.

Oil and Gas Leases: Discretion to Lease

The Secretary of the Interior may, in his discretion, refuse to lease land reserved for a particular purpose but subject to leasing under the Mineral Leasing Act where such leasing would be incompatible with the purpose for which the land is reserved.

Oil and Gas Leases: Applications

Offers to lease lands which were at the time of filing open to the filing of such offers are entitled to prior consideration over offers filed at a later date, following an interim when the area was closed to the filing of such offers.

Oil and Gas Leases: Rentals

Offers to lease lands in Alaska filed prior to and pending on May 3, 1958, are entitled to the benefit of section 10 of the act of July 3, 1958, notwithstanding the fact that action on such offers had been suspended by the Department.

[fol. 33]

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D. C.

A-28594	
James K. Tallman	Anchorage 044843
Alice P. Tallman	Anchorage 044844
A-28609	
Christine Fleischer	Anchorage 044842
William O. Rabourn	Anchorage 044845
Harry B. Cockrum	Anchorage 044846
Bailey E. Bell	Anchorage 044847
James G. Carlson	Anchorage 044848
Michael F. Beirne	Anchorage 044849
James E. O'Malley	Anchorage 044850
A-28619	
Waldo E. Coyle	Anchorage 045178
	Oil and gas lease offers rejected.
	Affirmed.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

James K. Tallman and others have appealed to the Secretary of the Interior from decisions of the Director and the Acting Director of the Bureau of Land Management affirming decisions of the Anchorage, Alaska, land office in rejecting their offers, filed on or after August 14, 1958, to lease for oil and gas purposes lands within the Kenai National Moose Range on the Kenai Peninsula, Alaska, pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226). The offers were rejected because they conflicted with leases issued during the fall of 1958, based on offers filed on various dates between October 15, 1954, and January 28, 1955.

The appellants contend that the leases based on the prior offers are null and void because the lands were not

open for the filing of offers when those offers were filed. They contend that they, the appellants, are the first qualified applicants for the lands. They contend, further, that the prior offers, having been suspended, were not "pending" offers within the meaning of section 10 of the act of July 3, 1958 (72 Stat. 322, 324), amending section 22 of the Mineral Leasing Act (30 U. S. C., 1958 ed., sec. 251), and that it was error to have issued those leases at a rental of 25 cents per acre for the first year of the leases.

[fol. 34]

The Moose Range was established on December 16, 1941, by Executive Order No. 8979 (6 F. R. 6471). The lands described in the order were, "for the purpose of protecting the natural breeding and feeding range of the giant Kenai moose of the Kenai Peninsula, Alaska, * * *" withdrawn and reserved for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose.

The order provides, with respect to a large part of the Range, that those lands shall not be subject to settlement, location, sale, or entry or other disposition under any of the public land laws applicable to Alaska or for classification or use under enumerated laws applicable only to Alaska.[1] Small portions of the Range were left available for settlement, location, sale, or entry, with the proviso that those lands were to be classified. Those lands classified as not suitable for settlement were no longer to be available for that purpose.[2]

The establishment of the Range did not have the effect of removing the lands therein from the operation of the Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 181 *et seq.*) This is so because nothing in the withdrawal specifically excludes those lands from the scope of the act. While such lands are open for leasing under the terms of

[1] All of the prior offers involved in these appeals except those in conflict with the Coyle offer (Anchorage 045178) cover lands in this category.

[2] The prior offers in conflict with Coyle's offer cover land left available for settlement, location, sale or entry.

the Mineral Leasing Act in the sense that offers to lease such lands may be filed, the Secretary of the Interior may, in the exercise of the discretion vested in him by the act, refuse to issue leases covering such reserved areas where the mineral development of the lands might seriously impair or destroy the purpose for which the lands are reserved. *West Central Corporation*, A-28523 (February 2, 1961); *Noel Teuscher et al*, 62 I.D. 210 (1955); *Martin Wolfe*, 49 L.D. 625 (1923).[3]

Thus unless some action taken after the Range was established and before these prior offers were filed closed the lands covered by those offers to the filing of oil and [fol. 35] gas lease offers, there was no prohibition against the filing of these prior offers.[4]

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[3] That the Secretary's discretion in the matter of the leasing of lands subject to the operation of the Mineral Leasing Act remains unimpaired, notwithstanding the material revision of that act in 1946, has recently been affirmed by the United States Court of Appeals, District of Columbia Circuit, in *Haley* v. *Seaton*, 281 F. 2d 620, 625 (1960).

[4] Appellants contend that Public Land Order 487 of June 16, 1948 (13 F. R. 3462), Public Land Order 1212 of September 9, 1955 (20 F. R. 6795), and an amendment thereof on October 14, 1955 (20 F. R. 7904), indicate an intention on the part of the Department not to open the Range, or at least that part of the Range affected by Public Land Order 487, to mineral leasing applications. Only the land involved in the Coyle offer was affected by Public Land Order 487. That order temporarily withdrew certain land in the Range, including the land covered by prior offers in conflict with the Coyle offer, which had theretofore been available for settlement, location, sale, or entry, from such settlement, location, sale or entry and reserved the land for classification, examination, and in aid of proposed legislation. The order provided that it took precedence over but did not modify the reservation for the Moose Range. However, Public Land Order 487 did not withdraw the land affected thereby from the operation of the Mineral Leasing Act or close that land to the filing of oil and gas lease applications any more than Executive Order No. 8979 did. The prior offers in conflict with the Coyle offer were filed while Public Land Order 487 was in effect.

Public Land Order 1212 revoked Public Land Order 487 and opened the lands for acquisition under specified laws and subject to the conditions set forth therein. Although Public Land Order 1212, as first published, appeared to delay the opening of the lands affected thereby to mineral leasing, the amendment of the order,

The only action taken by the Department with respect to lands reserved for the protection of wildlife, but otherwise available for leasing subject to such requirements as might be imposed for the protection and use of the lands for the purpose for which they were reserved (43 CFR 191.5; 43 CFR 192.9), was the suspension, on August 31, 1953, of action on all pending offers for oil and gas leases covering lands within wildlife refuges. This suspension was put into effect because of a study then in progress by the Department to determine whether there should be a revision in the policy of leasing such lands. That suspension did not prohibit the filing of offers to lease such lands but merely ordered the managers of the various land offices not to issue leases on refuge lands. Although that suspension was in effect when the offers in conflict with the appellant's offers were filed, it can not be said that the lands covered by those offers were not open to the filing of such offers on the various dates on which those offers were filed.
[fol. 36] The appellants have not pointed to, and I am not aware of, any action taken by the Department subsequent to the filing of the offers in 1954 and 1955 which would have required the rejection of those offers.

The regulation (43 CFR 192.9) relating to the leasing for oil and gas purposes of lands set aside for the protection of wildlife was amended on December 2, 1955 (20 F. R. 9009), to make certain of those areas unavailable for leasing under the terms of the Mineral Leasing Act, to provide that leases would be issued covering certain other designated areas only upon the approval of complete and detailed operating programs for those areas, and to set forth the conditions which must be expressed in any leases issued covering the balance of the lands set aside as wildlife refuges. Although that amendment set forth the determination that only those areas designated in Appendix A thereto would no longer be available for oil and gas leasing,[5] the suspension on the issuance of leases

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deleting the language referring to mineral leasing, makes it clear that the order was intended to have no such effect.

[5] The lands involved in the present appeals are not among those lands designated as being unavailable for leasing.

on lands remaining open to leasing was reimposed early in 1956.

On January 8, 1958, the regulation was again amended (23 F.R. 227; 43 CFR, 1959 Supp., 192.9). That regulation defines the various types of lands covered thereby, including Alaska wildlife areas, which are:

> "areas in Alaska created by a withdrawal of public lands for the management of natural wildlife resources and administered by the United States Fish and Wildlife Service." (Sec. 192.9(a)(4).)

The regulation then sets forth the leasing policy and procedure which will be followed with respect to the various categories of the areas defined. In so far as the regulation is pertinent to the present appeals, it provides that as to the Alaska wildlife areas (into which the Range naturally falls) representatives of the Bureau of Land Management and the United States Fish and Wildlife Service would confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing but that no such agreement would be effective until approved by the Secretary of the Interior (sec. 192.9(b)(3)); that those lands not closed to leasing would be subject to lease on the imposition of stipulations agreed upon by the two aforementioned agencies of the Department (sec. 192.9(b)(4); that the agreements referred to in sec. 192.9(b)(3) shall be published in the Federal Register and shall contain a description of the lands affected thereby which are not subject to oil [fol. 37] and gas leasing together with a statement of the stipulations agreed upon for inclusion in leases covering lands which shall remain available for leasing, to insure that all operations under such leases shall be carried out in such manner as will result in the minimum of damage to wildlife resources; that the agreements, as supplemented by maps or plats specifically delineating the lands, will be filed in the appropriate land office, and that:

> "Lease offers for such lands will not be accepted for filing until the tenth day after the agreements and supplemental maps or plats are noted on the land office records." (Sec. 192.9(c).)

Finally, the regulation provides:

> "All pending offers or applications heretofore filed for oil and gas leases covering * * * Alaska wildlife areas, will continue to be suspended until the agreements referred to in paragraph (b)(3) of this section shall have been completed." (Sec. 192.9(d).)

Thus it was not until the oil and gas leasing regulations were amended on January 8, 1958, that the Kenai National Moose Range was closed to the filing of oil and gas lease offers and the amendment specifically preserved the priorities of all pending offers.

On August 2, 1958, a notice dated July 24, 1958, that an agreement had been consummated, classifying lands within the Kenai Range as to their availability for oil and gas leasing purposes, was published in the Federal Register (23 F. R. 5883). There the Secretary designated those lands within the Range closed to oil and gas leasing. The remaining lands, including all lands involved in the present appeals, were again made subject to the filing of oil and gas lease offers in accordance with the provisions of the Mineral Leasing Act, the regulations in 43 CFR, Part 192, and the provisions of the notice. The notice specifically stated:

> "Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 CFR 192.9(d) will now be acted upon and adjudicated in accordance with the regulations."

The notice further provided that lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office and that all lease offers filed in that office on that day and for ten days thereafter would be treated as having been filed simultaneously.

[fol. 38] The agreement and the map were noted on the Anchorage land office records on August 4, 1958, and it was within the ten-day period following August 14, 1958, that the appellants' offers were filed. The appellants were

on notice at the time they filed their offers that if there were offers pending covering the lands included in their offers those offers would receive priority of consideration under that regulation in Part 192 which prohibits the issuance of an oil and gas lease before final action has been taken on any prior offer to lease the land (43 CFR 192.42 (m)), under the specific provisions of the January 8, 1958, amendment of 43 CFR 192.9, and under the specific terms of the notice making a portion of the lands within the Kenai National Moose Range available for oil and gas leasing.

In the circumstances, it was proper to have issued leases based on the pending offers, all else being regular.

The point raised by the appellants as to whether the leases based on the pending offers were properly issued at a rental of twenty-five cents per acre for the first year of the lease terms requires little discussion. The appellants belabor the difference between a suspended offer and a pending offer. They argue that the twenty-five cent rental applies only to those offers which were pending because the land office had not had the opportunity to process such offers and that it can not be applied to those offers on which the land office had been directed to take no action.

The act makes no such distinction. Under the provisions of the Mineral Leasing Act in effect when the prior offers were filed noncompetitive leases were conditioned upon the payment of advance rentals of not less than twenty-five cents per acre per annum. However, section 22 of the act, known as the Alaska Oil Proviso, authorized the Secretary of the Interior to fix the rental covering noncompetitive leases in Alaska and authorized him, in his discretion, to waive the payment of any rental for the first five years of any such leases. By regulation, the Secretary had fixed the rental of noncompetitive leases covering lands in the continental United States at fifty cents per acre for the first lease year and had fixed the rental on non-competitive leases covering lands in Alaska at twenty-five cents per acre (43 CFR 192.80). Section 10 of the act of July 3, 1958, amended section 22 of the Mineral Leasing Act to provide:

"* * * That the annual lease rentals for lands in the Territory of Alaska not within any known geological structure of a producing oil or gas field and the royalty payments from production of oil or gas sold or removed from such lands shall be identical with those prescribed for such leases covering similar lands in the States of the United States, except that leases which may issue pursuant to applications or
[fol. 39] offers to lease such lands, which applications or offers were filed prior to and were pending on May 3, 1958, shall require the payment of twenty-five cents per acre as lease rental for the first year of such leases; but the aforesaid exception shall not apply in any way to royalties to be required under leases which may issue pursuant to offers or applications filed prior to May 3, 1958. * * *"

The offers on which the leases questioned in these appeals were based were "filed prior to and were pending on May 3, 1958." Thus they meet the test of the statute. The fact that action on those offers was suspended by the Department did not deprive the offers of their status as pending offers and it can not deprive the offerors of the benefits of the statute.

Accordingly, it was not error to have issued the leases at a rental of twenty-five cents per acre for the first lease year.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A (4) (a), Departmental Manual; 24 F. R. 1348), the decisions of the Director and the Acting Director of the Bureau of Land Management are affirmed.

(Sgd) Edward W. Fisher
Deputy Solicitor

97839-61

[fol. 40]

EXHIBIT F TO COMPLAINT

McCARTY AND WHEATLEY
Counsellors at Law
Walker Building
734 Fifteenth Street, N.W.
Washington 5, D. C.

MEtropolitan 8-5882

Robert L. McCarty
Charles F. Wheatley, Jr.

February 15, 1962

The Honorable Stewart L. Udall
Secretary of the Interior
Washington 25, D. C.

My dear Mr. Secretary:

Enclosed herewith please find a petition for the exercise of your supervisory authority to correct serious errors in the administration of the public land laws pertaining to the Kenai National Moose Reserve, Alaska.

Respectfully submitted,

Charles F. Wheatley, Jr.

CFW:eb

Enclosure

[fol. 41] UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D.C.

A-28594	
James K. Tallman	Anchorage 044843
Alice P. Tallman	Anchorage 044844
A-28609	
Christine Fleischer	Anchorage 044842
William O. Rabourn	Anchorage 044845
Harry B. Cockrum	Anchorage 044846
Bailey E. Bell	Anchorage 044847
James G. Carlson	Anchorage 044848
Michael F. Bierne	Anchorage 044849
James E. O'Malley	Anchorage 044850
A-28619	
Waldo E. Coyle	Anchorage 045178

PETITION FOR EXERCISE OF SUPERVISORY AUTHORITY

The above parties respectfully petition the Secretary of the Interior to exercise his supervisory authority to correct serious errors in the administration of the public land laws entrusted to him by the President and Congress.[1] Petitioners duly appealed to the Secretary objecting to the issuance of oil and gas leases under section 17 of the Mineral Leasing Act, as amended, on lands within the Kenai National Moose Range, Alaska, pursuant to applications by representatives of various major oil companies in 1954 and 1955, prior to the time that the lands were first considered as available for such leasing by Order of Secretary Seaton dated July 24, 1958 (23 F.R. 5883). Petitioners were the first duly qualified applicants for such leases under the procedures for filing of lease offers set forth in the Order of July 24, 1958, their applications filed on or after August 14, 1958. In a purported attempt to exercise the authority of the Secretary, a deputy solicitor of

[1] See 43 C.F.R. § 221.78.

the Department rejected petitioners' appeals to the Secre-
[fol. 42] tary and approved the granting of oil and gas leases on lands within the Kenai National Moose Range pursuant to the applications submitted in 1954 and 1955. The petitioners respectfully submit that the Secretary should exercise his supervisory authority on all or any of the following grounds: (1) newly discovered evidence reveals that it was the intent of President Roosevelt in establishing the Kenai National Moose Reserve to close it to disposition under the Mineral Leasing Law, unless opened thereto by order of the Secretary of the Interior; (2) the deputy solicitor lacked authority to decide petitioner's appeals to the Secretary so that there has been no valid decision on the Secretarial level of petitioners' appeals; and (3) the deputy solicitor's purported decision conflicts with other decisions within the Department of Assistant Secretaries—a conflict which the Secretary should resolve in exercise of his supervisory authority for the proper administration of the Department. The grounds will be discussed in order below.

I. NEWLY DISCOVERED EVIDENCE REVEALS THAT IT WAS THE INTENT OF PRESIDENT ROOSEVELT IN ESTABLISHING THE KENAI NATIONAL MOOSE RESERVE BY EXECUTIVE ORDER IN 1941 THAT IT BE CLOSED TO ALL FORMS OF DISPOSITION UNDER THE PUBLIC LAND LAWS, INCLUDING THE MINERAL LEASING LAWS.

The deputy solicitor's purported decision rejecting petitioners' appeals to the Secretary concluded that the Kenai National Moose Range was open to oil and gas leasing at all times on the following grounds:

> "The establishment of the Range did not have the effect of removing the lands therein from the operation of the Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 181 *et seq.*). This is so because nothing in the withdrawal specifically excludes those lands from the scope of the act. While such lands are open for leasing under the terms of the Mineral Leasing Act in

the sense that offers to lease such lands may be filed, the Secretary of the Interior may, in the exercise of the discretion vested in him by the act, refuse to is-
[fol. 43] sue leases covering such reserved areas where the mineral development of the lands might seriously impair or destroy the purpose for which the lands are reserved. *West Central Corporation*, A-28523 (February 2, 1961); *Noel Teuscher et al*, 62 I.D. 210 (1955); *Martin Wolfe*, 49 L.D. 625 (1923)." (Decision of September 1, 1961, p. 2).

A search of the Presidential and Secretarial files at the National Archives pertaining to the establishment of the Kenai National Moose Reserve discloses new evidence which reveals that the lands withdrawn for the Reserve were not intended to be open for acquisition or disposition under *any* of the public land laws, thereby necessarily including the mineral leasing laws. The Reserve was initially proposed by the Fish and Wildlife Service of the Department of the Interior. In a Memorandum for the Secretary dated January 18, 1941, Mr. Gabrielson, Director of the Fish and Wildlife Service, explained the purpose of the withdrawal for the Kenai National Moose Range in clear and unmistakable language:

> "The draft proclamation as now drawn differs somewhat from that as considered by the General Land Office in that the strip of land 6 miles wide along the shores of Cook Inlet and Kachemak Bay, which was omitted from the proposed refuge in the first draft, is now included because it would be impossible to administer the refuge with this undefined boundary. The intention of the proclamation as the draft is now drawn is to make all of the area described a part of the refuge, but leaving the six mile strip along the shores of Cook Inlet and Kachemak Bay available for use and disposition pursuant to the public land laws applicable to Alaska. *Other than the 6 mile strip as described in the draft, it is the intention that the remainder of the refuge area be reserved from settlement, location, sale, or other disposition under any of the public land laws applicable to Alaska*

> and from classification and lease under the provisions of the acts of July 3, 1926 (44 Stat. 821, 48 U.S.C. Sup. 360-361) entitled 'Act to provide for the lease of public lands in Alaska for fur farming and other purposes', and of March 4, 1927 (44 Stat. 1452, 48 U.S.C. Sup. 471-471o) entitled 'An act to provide for the protection, development, and utilization of public lands in Alaska by establishing an adequate system of grazing livestock thereon.'.
>
> * * * *
>
> [fol. 44] "I recommend that if the action meets with your approval the draft of the proposed proclamation be forwarded to the President." (Emphasis supplied; see Exhibit A attached.)

It would be difficult to imagine any language of intent expressed more clearly—the Reserve in the Director's view, other than the 6 mile strip where the public land laws applicable to Alaska would apply, was to be withdrawn from any "disposition" under "any of the public land laws applicable to Alaska." [1] The final Executive Order issued by President Roosevelt on December 16, 1941 to establish the Reserve, expressly adopted the language proposed and explained by the Fish and Wildlife Service Director:

> "By virtue of the authority vested in me as President of the United States, it is ordered that, for the purpose of protecting the natural feeding range of the giant Kenai moose on the Kenai Peninsula, Alaska, which in this area presents a unique wildlife feature and an unusual opportunity for study in its natural environment of the practical management of a big game species that has considerable local value,

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[1] The *Teuscher* case (62 I.D. 210 (1955)) cited by the deputy solicitor relied extensively on a similar type supporting document in order to construe the meaning of the Executive Order withdrawing lands there involved. See 62 I.D. at 213. Why the deputy solicitor in the present case did not turn to such "legislative history" of the Executive Order establishing the Kenai Moose Reserve is difficult to understand, except for the fact that the files involved had been transferred to National Archives. See also *P & G Mining Co.*, 67 I.D. 217, 219 (1960).

all of the hereinafter-described areas of land and water of the United States lying on the northwest portion of said Kenai Peninsula, be, and they are hereby, subject to valid existing rights, withdrawn and reserved for the use of the Department of the Interior and Alaska Game Commission as a refuge and breeding ground for moose . . . .

"*None of the above-described lands* excepting Tps 5N., Rs. 8, 9, 10, and 11 W., and also excepting a strip six miles in width along the shore of Cook Inlet, extending from a point six miles east of Boulder Point to the point on Kasilof River intersected by said six-mile strip, *shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska*, or to classification and lease under the provisions of the act of July 3, 1926, entitled 'An Act to [fol. 45] provide for the leasing of public lands in Alaska for fur farming, and for other purposes', 44 Stat. 821, U.S.C., title 48, secs. 360-361, or the act of March 4, 1927, entitled 'An Act to provide for the protection, development, and utilization of the public lands in Alaska for establishing an adequate system for grazing livestock thereon', 44 Stat. 1452, U.S.C., title 48, secs. 471-4710: *Provided, however*, That *as to the foregoing excepted lands*, primary jurisdiction thereover shall remain in the General Land Office of the Department of the Interior and *their reservation and use as a part of the national moose range shall be without interference with the use and disposition thereof pursuant to the public-land laws applicable to Alaska*: . . ." (Executive Order No. 8979, dated December 16, 1941, 6 F.R. 6471; emphasis supplied.)[1]

The express intent of the withdrawal to close the lands embraced therein to disposition under the mineral leasing

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[1] The distinction in the Executive Order between the lands closed to any disposition under the public-land laws and lands within the reserve but subject to disposition under the public-land laws is important in interpreting subsequent action by the Secretary relating to the Reserve.

laws as one of the applicable public-land laws in Alaska [2] adopting the clear intent as expressed by the Director of the Fish and Wildlife Service, is further confirmed by the established accepted interpretation of the meaning of the language used in 1941 when the Order was promulgated. The words providing that "None of the . . . lands . . . shall be subject to settlement, location, sale, or entry, or other disposition . . . under any of the public-land laws" had been definitively interpreted at least three times by the United States Supreme Court prior to 1941 as embracing oil lands subject to disposition under either the Mining Laws or the Mineral Leasing Act of 1920.

The first such instance was the leading case of *United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915), which held that the President by virtue of his inherent power as head of the Executive Branch, could withdraw lands containing oil deposits from location under the then applica- [fol. 46] ble Mining Laws enacted by Congress.[1] In 1909, President Taft withdrew lands by Executive Order using the following language:

> ". . . all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public-land laws . . . . :

There was no issue raised in the case but that the language was effective to withdraw the lands involved from mining for oil under the then applicable Mining Laws. In sustaining the President's power to issue the order, the Court relied heavily on custom, noting among the many instances of Executive Orders withdrawing lands from all types of entry under the public-land laws, some

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[2] As of 1941, it was clear that the Mineral Leasing Act of 1920 as amended was part of the public land laws applicable to Alaska. 43 C.F.R. part 51; 43 C.F.R. § 71.1, (1955 edition).

[1] The Supreme Court has also affirmed the President's inherent power to withdraw lands from leasing under the Mineral Leasing Act. *United States ex rel McLennan* v. *Wilbur*, 283 U.S. 414 (1931); See also *Martin Wolfe*, 49 L.D. 625 (1923).

44 Executive Orders regarding withdrawals for bird and wildlife purposes. (236 U.S. at 470)

The language of the withdrawal order involved in the *Midwest Oil* case is obviously very similar to the language used by President Roosevelt in the Executive Order withdrawal of 1941 establishing the Kenai Moose Reserve.

The second Supreme Court decision predating 1941 interpreting language used in a withdrawal order was *Mason et al* v. *United States*, 260 U.S. 545 (1923). The case was a suit by the United States to quiet title to oil lands and for an accounting for oil extracted by the defendants. Prior to defendants' development of the lands, they had been withdrawn by an Executive Order of December 15, 1908, stating that "public lands . . . are . . . withdrawn from settlement and entry, or other form of appropriation." The Court held that the validity of the order had been confirmed by the prior *Midwest Oil Co.* case, "where it was held that a similar order, issued in 1909, was within the power of the Executive." (260 U.S. at 553.) In the *Mason* case it was argued that the [fol. 47] words of the order "or other form of appropriation" must be limited to the immediately preceding words of "settlement and entry" thus limiting the scope of the withdrawal to settlements under the Homestead Laws and not embracing the Mining Laws, which involved a "location and development" for oil claims.[1] The Court rejected this argument holding that the words used "or other form of appropriation" certainly embraced the Mining Laws:

> ". . . it is insisted that the order does not apply to the cases here presented. The point sought to be made rests upon the rule of statutory construction that words may be so associated as to qualify the meaning which they would have standing apart. Here, it is said, the general words of the order, 'or other form of appropriation,' must be read in connection with the specific words 'settlement and entry,' immediately preceding; and that, so read, they must be restricted to appropriations of a similar kind with those specifically enumerated. The words 'settlement

[1] Prior to 1920 oil lands were developed under the Mining Laws.

> and entry,' it is said, apply only to the act of settling upon the soil and making entry at a land office; as, for example, under the Homestead Laws; that mining lands are acquired, not by settlement or entry, but by location and development; and that this process is not covered by the words 'other form of appropriation,' limited, as they must be, by the associated specific words, to those forms of appropriation which are akin to a settlement and entry. The rule is one well established and frequently invoked, but it is, after all, a rule of *construction*, to be resorted to only as an aid to the ascertainment of the meaning of doubtful words and phrases, and not to control or limit their meaning contrary to the true intent. It cannot be employed to render general words meaningless, since that would be to disregard the primary rules that effect should be given to every part of a statute, if legitimately possible, and that the words of a statute or other document are to be taken according to their natural meaning. Here the supposed specific words are sufficiently comprehensive to exhaust the genus and leave nothing essentially similar upon which the general words may operate . . . . We conclude, therefore, that the mining locations here relied upon fell clearly within the withdrawal order, and consequently were prohibited by it." (260 U.S. at 553-555)

[fol. 48] Under the holding of the *Mason* case, clearly the words of the 1941 Executive Order establishing the Kenai Moose Reserve withdrawing the lands from "other disposition . . . under any of the public-land laws applicable to Alaska" cannot be limited to applications for "settlement" and only make sense under the ordinary usage of the English language if applicable to other forms of use of public lands under the public-land laws.

In a third case decided just five years prior to 1941, the Supreme Court again confirmed its interpretation of the general language similar to that used in the 1941 Moose Reserve, as withdrawing lands containing oil deposits from rights granted by § 20 of the Mineral Leasing Act of 1920. *Bordieu* v. *Pacific Western Oil Co.*, 299 U.S.

65 (1936). The lands in question had been withdrawn by the President on December 30, 1910 "from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting use and disposal of petroleum lands". The Court held as follows:

> "The case presented by the bill comes to this: Petitioner asserts a preference right to prospect for oil and other minerals and, if successful, to obtain a lease under § 20 of the leasing Act of 1920, in virtue of his homestead entry in 1919 and patent in 1925 . . . . The lands here in question when entered were within the terms of the Executive order of 1910, by which order they were 'withdrawn from settlement, location, sale or entry and reserved for classification . . . .' Whether a 'classification' of the lands was effected by the order we need not determine since it is clear that they were 'withdrawn' by the definite and unambiguous words of the order; and, as shown by the bill, it is enough to exclude complainant from the privileges of the Act of 1920 that the lands were either withdrawn *or* classified . . . ." (299 U.S. 69-70.)

Thus, in 1941 when the President issued Executive Order No. 8979 establishing the Kenai National Moose Reserve as a wildlife refuge, the words he employed had become words of art under the existing decisions of the Supreme Court interpreting similar withdrawal orders; in every case it had been held that the language withdrew and closed the lands to development under the applicable Min- [fol. 49] ing or Mineral Leasing Laws.[1]

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[1] That the precise words used in the 1941 order precluding "other disposition . . . under any of the public-land laws applicable to Alaska" may have been ever more carefully selected than required under the broad rulings and interpretations of the Supreme Court cases may be seen from the analysis of prior Interior decisions in *Noel Teuscher et al*, 62 I.D. 210 (1955). *Teuscher* referred to several such decisions which were prior to the Supreme Court's ruling in *Mason et al.* v. *United States*, *supra*, and obviously superseded by it. In an opinion dated Setpember 30, 1921 (48 L.D. 459) the Solicitor held that a reservation of lands of the United States ". . . . from entry, location or other disposal under the laws of the United States" did not remove the reserved lands from leasing

The subsequent action by the Department with respect to the Kenai National Moose Reserve up to the purported decision by the deputy solicitor rejecting petitioners' appeals is consistent only with the clear interpretation developed above that the Range was closed to oil and gas leasing under the Mineral Leasing Act.

In Public Land Order 487 of June 16, 1948 (13 F.R. 3462), the Secretary withdraw from "settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation" certain lands among which were the lands previously withdrawn by Executive Order 8979 of December 16, 1941 establishing the Moose Reserve. The order specifically provided that "this order shall take precedence over, but shall not modify . . . the [fol. 50] reservation for the Kenai National Moose Range made by Executive Order No. 8979 of December 16, 1941 . . ." Public Land Order 1212 of September 9, 1955 (20 F.R. 6795) (1) revoked in its entirety Public Land Order 487 of June 16, 1948 and (2) provided that certain lands within the excepted area of the Moose Reserve (see *supra*, p. 5 and p. 5 note 1) should *thereafter* be subject to mineral leasing. It stated as follows:

> "6. Any of the lands described in paragraphs 4(a), 4(b) or 4(d) of this order then remaining unappropriated, shall become subject to such application, petition, selection, or other form of appropriation by the public generally as may be authorized by the public-

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under the Mineral Leasing Act because a lease is not an "entry, location or other disposal". Similarly in *Amerman* v. *Mackenzie*, 48 L.D. 580 (1922) the Department held that a permit under the leasing act is not an "entry, or an appropriation of land with a view to the acquisition of title thereto . . ." The words used in the 1941 Executive Order creating the Kenai Moose reserve overcome both of these two limitations for they withdrew the lands not from "disposal" or "appropriation" but from "*other disposition* . . . under *any* of the public-land laws applicable to Alaska." Thus the 1941 Order is clear and unambiguous. The closing of the Moose Reserve lands to oil and gas leasing thereunder, especially as interpreted in the newly discovered substantiating documents, is completely consistent with the analysis of the *Teuscher* case involving an Executive Order not containing such broad language. *Accord*, *see P & G Mining Co.*, 67 I.D. 217 (1960).

land laws, *including the mineral-leasing laws*, as follows:

> "(a) As to the lands described in paragraph 4 (a), at 10:00 a.m. on the 126th day after the date of this order." (Emphasis supplied.)

Public Land Order No. 1212 was immediately amended on October 14, 1955 (20 F.R. 7904) to eliminate the provision for leasing under the "mineral leasing laws:

> "Paragraphs No. 6 and 7 of Public Land Order No. 1212 of September 9, 1955, appearing as Doc. 55-7464 in 20 F.R. 6795 of the issue of September 15, 1955, are hereby amended by deleting therefrom the phrases 'including the mineral leasing laws', 'including applications under the mineral leasing laws', and 'including leasing under the mineral leasing laws', wherever they appear, and by adding after the words 'mining locations' in the last sentence of paragraphs 6 and 7 of the order the words 'for non-metalliferous minerals."

From this it is clear that the Department of the Interior did not intend to open the Moose Range, or certainly that part covered by Public Land Order No. 487, to mineral leasing applications. If, as the deputy solicitor states (note 4, page 3, Decision of September 1, 1961), Public Land Order 1212 applied only to the excepted land in the original 1941 Moose Reserve originally open to settlement, location, sale or entry, so that the amendment of October 14, [fol. 51] 1955 was necessary since these lands were always open to mineral leasing, it follows that no amendment would have been necessary if Public Land Order 1212 applied to Moose Range lands not within the excepted area. On such lands, as clearly revealed by paragraphs No. 6 and 7 of Public Land Order No. 1212, leasing was closed until and unless specifically opened by the Secretary.

The Interior Regulations in effect in 1955 pertaining to oil and gas leases on wildlife refuge lands at no place state that all such refuges are open to oil and gas leasing.

In fact of the numerous refuges in existence throughout the United States, the Executive Orders under which they were created varied considerably in their terms as to whether oil and gas leasing is permissible. For example Executive Order 9167 of May 19, 1942 (F. R. Doc. 42-4631) establishing the Halfbreed Lake National Wildlife Refuge, Montana, and Executive Order 9166 of May 19, 1942 establishing the Lamesteer National Wildlife Refuge (7 F.R. 3767) contain no provision at all withdrawing the lands from "settlement, location, sale, or entry, or any other disposition . . . under any of the public-land laws" as contained in the Kenai National Moose Reserve Executive Order. Thus the provisions of the Interior Regulations in existence in 1955 pertaining to leases within wildlife refuge lands, setting certain conditions for the issuance of leases therein, pertain only to those refuges which by their terms are open to such leasing. (43 C.F.R. § 192.9, 1955 Ed.)

The amendment of December 2, 1955 (20 F.R. 9009) to the regulation relating to the leasing for oil and gas purposes of wildlife refuge lands makes it crystal clear that the lands within the Kenai National Moose Reserve involved in the present petition were closed to oil and gas leasing. Appendix B to the amendment entitled "Fish and Wildlife Service Lands Available for Leasing Under a Satisfactory Development and Operating Plan" did not embrace the lands in the Kenai Moose Reserve involved in the present action. Thus those lands remained closed to [fol. 52] oil and gas leasing, in addition to the lands listed in Appendix A previously open to leasing by the terms of their withdrawal orders which were to be thereafter closed for future leasing. There was no reason to list the Kenai Moose Reserve in Appendix A because it was closed by the very terms of its establishing order.

On January 8, 1958, the regulation involving oil and gas leasing in general on wildlife refuges was extensively amended (23 F.R. 227; 43 C.F.R., 1959 Supp., 192.9). The first paragraph of the amendment made it clear that only certain of the existing refuges were open to mineral leasing by the terms of the orders establishing them:

§ 192.9 *Leasing of wildlife refuge lands, game range lands and coordination lands—(a) Definitions—(1) Wildlife refuge lands.* Such lands are those embraced in a withdrawal of public domain and acquired lands of the United States for the protection of all species of wildlife within a particular area. Sole and complete jurisdiction over such lands for wildlife purposes is vested in the United States Fish and Wildlife Service *even though such lands may be subject to prior rights for other public purposes or, by the terms of the withdrawal order, may be subject to mineral leasing.*" (Emphasis supplied.)

Under the definitions established in the amendment, it was not clear whether the Kenai National Moose Reserve which was described in the 1941 Executive Order as a "refuge" and under which, by the terms of the "Alaska Game Law of January 13, 1925, 43 Stat. 739, U.S.C., title 48, secs. 192-211," expressly mentioned in the 1941 Order covered all wildlife, was a "wildlife refuge land" or an "Alaska wildlife area." Assuming it to be the latter, then the effect of the January 8, 1958 amendment to the general regulation was to permit for the first time the opening of the Moose Reserve for oil and gas leasing, but only under the restrictive conditions set forth in the regulation.[1]

[fol. 53] The regulation expressly provided:

"Lease offers for such lands will not be accepted for filing until the tenth day after the agreements and supplemental maps or plats are noted on the land office records." (Sec. 192.9(c).)

Section 192.9(d) of the 1958 amendment provided as follows:

"(d) *Suspension of pending applications.* All pending offers or applications heretofore filed for oil and

[1] It is clear that the January 8, 1958 general amendment to the regulations and the specific order of August 2, 1958 (dated July 24, 1958) (23 F.R. 5883) since issued by the Secretary were effective to amend the 1941 Order. *Wilbur* v. *U.S.* 46 F. 2d (1930).

gas leases covering game ranges, coordination lands, and Alaska wildlife areas, will continue to be suspended until the agreements referred to in paragraph (b)(3) of this section shall have been completed."

The suspensions referred to were those of August 31, 1953 and early 1956, which were not directed at the Kenai National Moose Reserve, but all wildlife reserves in the country. Hence the suspensions were legally applicable only to those reserves which by the terms of the withdrawal orders were open to oil and gas leasing. Since the Kenai National Moose Reserve by its terms was closed to any such disposition under the mineral leasing laws, the broad general suspensions of 1953 and 1956 referred to in section 192.9(d) of the 1958 amendment had no applicability to it.

That the lands within the Kenai National Moose Reserve were closed until the procedures established by the January 8, 1958 amendment could be effectuated to open certain portions of it subject to restrictive conditions, is clear from the precise order issued August 2, 1958 with respect to the Reserve by the Secretary of the Interior (23 F.R. 5883). The Order expressly provided:

> "*Closed area.* The following described lands within the boundaries of the Kenai National Moose Range, Alaska, *are not opened to oil and gas leasing:*" (Emphasis supplied.)

The Order expressly provided further:

[fol. 54] ". . . lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office of the Bureau of Land Management in Anchorage, Alaska. All lease offers filed in that office on that day and until 10 a.m., on the tenth day thereafter will be treated as having been filed simultaneously. The priorities of all offers which conflict in whole or in part will be determined in accordance with the procedure outlined in the regulation 43 CFR 295.8."

Petitioners filed their offers to lease in accordance with the above provision on that portion of the Moose Reserve opened as a consequence of the Secretary's regulations of January 8, 1958 and order of August 2, 1958. They have the priority accorded thereby, and their lease applications should have been granted as the first qualified applicants. *McKay* v. *Wahlenmaier*, 226 F. 2d 35, 43 (D.C. Cir. 1955); *McKenna* v. *Seaton*, 259 F. 2d 78 (D.C. Cir. 1958).[1]

The provision in the order of August 2, 1958 (23 F.R. 5883) stating that—

> "Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 CFR 192.9(d) will now be acted upon and adjudicated in accordance with the regulations."

can only apply to areas opened originally to oil and gas leasing. As seen with respect to the Kenai National Moose Reserve, this could apply only to the excepted area which the 1941 Executive Order expressly provided was subject to the "public-land laws applicable in Alaska." (See p. 5 *supra*, and note 1, page 5.)

Thus, it appears that the history of regulations adopted by the Secretary pertaining to the Kenai National Moose Reserve are consistent only with the construction of the withdrawal order creating the Reserve as shown in the [fol. 55] supporting documents that it was to be closed to all disposition under the public-land laws applicable in Alaska, thus in terms excluding oil and gas leasing. The "decision" by the deputy solicitor rejecting petitioners' appeals to the Secretary and approving the granting of oil and gas leases on lands within the Kenai National Moose Range pursuant to applications submitted in 1954 and 1955 while the Range was closed was not only erroneous, but void as lacking authority.

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[1] See R. S. Prows, 66 I.D. 19 (1959).

II. THE DEPUTY SOLICITOR LACKED AUTHORITY TO DECIDE PETITIONERS' APPEALS TO THE SECRETARY.

The purported decision by the deputy solicitor of petitioners' appeals to the Secretary of the Interior, states that it was authorized as follows:

> "Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decisions of the Director and the Acting Director of the Bureau of Land Management are affirmed." (Decision, p. 7)

However, the order of delegation of authority cited by the deputy solicitor limits the delegation as follows:

> "200.2.1 *General limitations.*
>
> "A. Nothing in this Delegation Series empowers any officer or employee of the Department to exercise authority which the Secretary may not redelegate. For example the Secretary may not redelegate the authority. . . .
>
> "B. In certain instances, the provisions of a delegation of authority to the Secretary confine redelegation to specified officers. In those cases there is a redelegation of authority in this Delegation Series only if the authority is expressly mentioned. For example . . . the authority under Executive Order 10355, to withdraw or reserve certain lands, which may be redelegated only to the Under Secretary and the Assistant Secretaries, is expressly mentioned in 210.1.1 and 1.2.
>
> "210.1.1 *Under Secretary.*
>
> "A. The Under Secretary is authorized to: . . .
>
> [fol. 56] "(3) Exercise the authority delegated to the Secretary by Executive Order 10355, relating to the withdrawal or reservation of certain lands by the issuance of public land orders.
>
> "B. The Under Secretary may not redelegate the authority delegated to him by subpar. A.

"210.1.2 *Assistant Secretaries.*

The Assistant Secretaries, as used in the Delegation Series, include the Assistant Secretary—Mineral Resources, the Assistant Secretary—Public Land Management, the Assistant Secretary—Water and Power Development, but does not include the Assistant Secretary for Fish and Wildlife and Administrative Assistant Secretary.

"A. The Assistant Secretaries severally are authorized to: . . . (2) Exercise the authority delegated to the Secretary by Executive Order 10355, relating to the withdrawal of reservation of certain lands by the issuance of public land orders."

The Kenai Moose Range was created pursuant to the general power of the President to withdraw lands for wildlife refuges. 37 Ops. Atty. Gen. 415 (1934); 37 Ops. Atty. Gen. 502 (1934); *cf. United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915). Power to revise or change the terms of Executive Order No. 8979 of December 16, 1941 (6 F.R. 6471) creating the Reserve and precluding any disposition thereof under the Mineral Leasing laws (see I, *supra*, pp. 2-15) was delegated to the Secretary of the Interior (and the Under Secretary or Assistant Secretaries) by the President in Executive Order No. 10355 of May 26, 1952 (17 F.R. 4831), which provides as follows:

"Section 1. (a) Subject to the provisions of subsections (b), (c), and (d) of this section, I hereby delegate to the Secretary of the Interior the authority vested in the President by section 1 of the act of June 25, 1910, ch. 421, 36 Stat. 847 (43 U.S.C. 141), and the authority otherwise vested in him to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, *including the authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made.*" (Emphasis supplied.)

[fol. 57] Petitioners' appeals to the Secretary of the Interior for the issuance of leases could have been rejected only if the Kenai National Moose Reserve was validly open to oil and gas leasing in 1954 and 1955 when the applications by representatives of major oil companies were filed. The purported decision by the deputy solicitor retroactively opening the Reserve by approving the issuance of these leases was unauthorized because the Secretary has not delegated his authority to modify or revoke withdrawals and reservations to a deputy solicitor. Thus petitioners' appeals can only properly be decided by the Secretary, the Under Secretary, or an Assistant Secretary, as specified in order delegating authority within the Department (24 F.R. 1348, *supra*).[1] The deputy solicitor's ruling that the Reserve was open to mineral leasing prior to the Secretary's orders of January 8, 1958 and August 2, 1958, *supra*, was beyond his delegated authority. As a consequence there has been no valid decision on the Secretarial level of petitioners' appeals. The omission should be corrected by an exercise of supervisory authority by the Secretary.

III. THE DEPUTY SOLICITOR'S PURPORTED DECISION CONFLICTS WITH OTHER DECISIONS BY ASSISTANT SECRETARIES WITHIN THE DEPARTMENT—A CONFLICT WHICH THE SECRETARY SHOULD RESOLVE IN EXERCISE OF HIS SUPERVISORY AUTHORITY FOR THE PROPER ADMINISTRATION OF THE DEPARTMENT.

In *P & G Mining Co.*, 67 I.D. 217 (1960) an Assistant Secretary reached a conclusion diametrically opposite from

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[1] With respect to an appeal involving lands in the southern part of the Kenai Moose Reserve, the matter was decided by an Assistant Secretary. *Richard K. Todd et al*, A-28090, October 30, 1961. While the matter was not analyzed by Assistant Secretary Carver in that decision, many of the problems faced by the closing of the southern part of the Reserve by the August 2, 1958 order are removed if the entire Reserve, as shown by the newly discovered evidence submitted in I, *supra*, pp. 2-15, was intended to be closed until opened by the Secretary.

[fol. 58] that of the deputy solicitor in interpreting a withdrawal order establishing the Imperial National Wildlife Refuge by Executive Order 8685 dated February 14, 1941 (6 F.R. 1016). The Imperial Refuge, created the same year as the Kenai National Moose refuge, was not as explicit as the Moose order in withdrawing lands from mineral disposition. The Imperial order read as follows:

> "By virtue of the authority vested in me as President of the United States, and by the act of June 25, 1910, c. 421, 36 Stat. 847, as amended by the act of August 24, 1912, c. 369, 37 Stat. 497, it is ordered that all lands owned by the United States within the following described areas, more or less, in Yuma County, Arizona, and Imperial County, California be, and they are hereby reserved and set apart, subject to valid rights, for the use of the Department of the Interior as a refuge and breeding ground for migratory birds and other wildlife . . ."

There was no language at all in the Imperial order as contained in the Kenai order which explicitly reserved the lands from any "disposition under any of the public-land laws applicable in Alaska." Nevertheless, the Assistant Secretary ruled that the Imperial order by its very terms was intended to reserve the lands from disposition under the mining laws, even though the act of June 25, 1912 as amended by the act of August 24, 1912 cited in the order expressly permitted entry of such withdrawals for the mining of metalliferous minerals:

> "In this instance, the withdrawal was made in the exercise of the President's inherent power, as evidenced by the fact that a permanent refuge was established, although the authority conferred by the statute is also cited. This seems to have been a fairly common practice for a number of years. It is significant that in some instances wherein both the President's inherent authority and the statutory authority are relied upon there is a specific provision that mining activities shall not be prohibited. *This indicates clearly that a full exercise of Presidential authority*

was intended in every instance wherein such language was not included in the withdrawal order. Accord-
[fol. 59] ingly, it cannot be supposed that a reference to the act of June 25, 1910, in the withdrawal order was intended to effect or has effected consent or acquiescence in the continuation of mining activities in the lands included in the Imperial National Wildlife Refuge." (67 I.D. at 219-220; emphasis supplied.)

Since the Kenai Moose Reserve included no such express language *permitting* disposition under the mineral leasing laws, the ruling of the *P & G Mining Co.* case requires a conclusion that the Moose order was a full exercise of Presidential authority to withdraw the lands, and effectively withdrew the lands from the operation of the mineral leasing laws. *Cf. United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915); *Wilbur* v. *United States*, 46 F. 2d 217, 220 (D.C. Cir. 1930).

Another current case directly conflicting with that of the deputy solicitor is that of *Frank M. McGinley*, 67 I.D. 194 (1960). In *McGinley* the lands sought by an applicant for an oil and gas lease had been withdrawn by a Public Land Order "from all forms of *disposition, including the mineral leasing laws*" (67 I.D. at 195). The case holds that the President has inherent authority to so withdraw the lands which was delegated to the Secretary of the Interior by Executive Order 10355:

> "Furthermore, the Secretary, acting under the authority delegated to him by the President in Executive Order 10355 of May 26, 1952, can withdraw public land from all forms of appropriation under the public land laws, including the mining and mineral leasing laws . . . ." (67 I.D. at 197).

Accordingly, the lands were held not available for leasing under the Mineral Leasing Act. The case is a recognition that the word "disposition" expressly used in the Kenai Moose Range order "includes" leasing under the mineral leasing laws. Again the decision conflicts with that of the deputy solicitor with respect to petitioners' appeals.

CONCLUSION

For the three reasons discussed above, or any of them, [fol. 60] petitioners respectfully request the Secretary to exercise his supervisory powers to decide petitioners' appeals and correct the serious administrative discrepancies revealed herein. Under the proper interpretation of President Roosevelt's Executive Order of 1941 establishing the Kenai National Moose Reserve as revealed in the newly discovered evidence submitted herewith, the Kenai Moose Reserve was closed to oil and gas leasing until expressly opened under specific conditions by the Secretary's order in 1958. The leases so issued must be cancelled and petitioners' applications filed pursuant to the specific instructions by the Secretary, approved.

Respectfully submitted,

CHARLES F. WHEATLEY, JR.
1203 Walker Building
Washington 5, D.C.

Attorney for petitioners

[fol. 61]

In Reply Refer to

LA - EO
Alaska
Kenai

Address only the
Director, Fish and Wildlife Service

File Copy
Surname:
[Illegible]

UNITED STATES
DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
WASHINGTON

January 18, 1941.

MEMORANDUM for the Secretary.

In accordance with your instructions, there is transmitted herewith draft of a proposed proclamation to establish the Kenai National Moose Range in Alaska.

The proposed range is to be established on an area of land and water lying on the northwest portion of the Kenai Peninsula comprising approximately 2,700,000 acres. The purpose of the proposed proclamation is to reserve this area for the use of the Department of the Interior as a refuge and breeding ground for moose. This area is the natural habitat for these animals and its location affords an opportunity for effective administration.

A draft of a form of proposed proclamation has been considered by the General Land Office and returned without endorsement because the War Department has made a request for withdrawal for use as an aerial gunnery range of a tract embracing the entire northern part of the proposed moose range, which is described as follows:

> Beginning at a point known as Point Possession, in Lot No. 2, Section 17, Township 11 North, Range 6 West, S. M.; thence southwest along the South shore of Cook Inlet, a distance of approximately 40 miles, to Boulder Point; thence due South a distance of approximately 14 miles to a point approximately 2

miles North of Kenai Village; thence due East, a distance of approximately 19 miles to the Moose River; thence up the Moose River, a distance of approximately 10 miles; thence in a Northeasterly direction to the mouth of Mystery Creek; thence down the Chickaloon River to its mouth; thence Northwest along the South shore of Chickaloon Bay to the point of beginning, excluding the Nicoli Indian Village at Point Possession and the Matthison Village at the mouth of Chickaloon River, as well as the trail leading from the mouth of the Moose River to the Village of Kenai.

The area described above includes what, in my opinion, is the best part of the moose range and I would like to see it reserved for refuge purposes rather than an aerial gunnery range, and would like to discuss with you the pos- [fol. 62] sibility of modifying or relocating the proposed aerial gunnery range.

The draft proclamation as now drawn differs somewhat from that as considered by the General Land Office in that the strip of land 6 miles wide along the shores of Cook Inlet and Kachemak Bay, which was omitted from the proposed refuge in the first draft, is now included because it would be impossible to administer the refuge with this undefined boundary. The intention of the proclamation as the draft is now drawn is to make all of the area described a part of the refuge, but leaving the six mile strip along the shores of Cook Inlet and Kachemak Bay available for use and disposition pursuant to the public land laws applicable to Alaska. Other than the 6 mile strip as described in the draft, it is the intention that the remainder of the refuge area be reserved from settlement, location, sale, or other disposition under any of the public land laws applicable to Alaska and from classification and lease under the provisions of the acts of July 3, 1926 (44 Stat. 821, 48 U.S.C. Sup. 360-361) entitled "Act to provide for the lease of public lands in Alaska for fur farming and other purposes", and of March 4, 1927 (44 Stat. 1452, 48 U.S.C. Sup. 471-471o) entitled "An act to provide for the protection, development, and utilization of public lands in

Alaska by establishing an adequate system of grazing livestock thereon".

It is further the intention that the proclamation will leave with you as Secretary of the Interior, the direction of the use and the regulation of the area so that the moose thereon may be conserved and at the same time properly controlled.

I recommend that if the action meets with your approval the draft of the proposed proclamation be forwarded to the President.

[Illegible]

Director.

Enclosure 2300489.

[fol. 63] EXHIBIT G TO COMPLAINT

In Reply Refer to:

[SEAL]

A-28594
A-28609
A-28619

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON 25, D. C.

April 25, 1962

Mr. Charles F. Wheatley, Jr.
Attorney at Law
1203 Walker Building
Washington 5, D. C.

Dear Mr. Wheatley:

We have considered the petition for the exercise of supervisory authority by the Secretary of the Interior in the matter of the Departmental decision of September 1, 1961, in *James K. Tallman et al.* (A-28594, A-28609, and A-28619), involving certain oil and gas lease offers on lands within the Kenai National Moose Range on the Kenai Peninsula, Alaska, enclosed with your letter of February 15, 1962.

We find nothing therein which would warrant any change in the decision of September 1, 1961.

Accordingly, the petition is denied and the decision of September 1, 1961, will stand as the final decision of the Secretary in the matter.

Sincerely yours,

/s/ Edward W. Fisher
Deputy Solicitor

[fol. 64]

[fol. 65]

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1852-62

* * * *

DEFENDANT'S MOTION TO DISMISS—Filed July 18, 1962

The defendant moves the Court to dismiss this action because it is barred by the 90-day statute of limitations, Act of September 2, 1960, 74 Stat. 790, 30 U.S.C. § 226-2, and this fact is apparent from the complaint and the exhibits attached thereto.

Respectfully,

/s/ Herbert Pittle

* * * *

Attorney, Department of Justice

Attorney for Defendant

* * * *

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1852-62

* * * *

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANT'S MOTION TO DISMISS—Filed August 23, 1962

Plaintiffs, by their attorney, move the Court for summary judgment pursuant to Rule 53 of the Federal Rules of Civil Procedure, in accordance with the relief sought in the complaint. This motion is based on the following grounds:

[fol. 66] 1. Defendant's motion to dismiss constitutes an admission of all the material facts recited in the complaint pertaining thereto.

2. There is no genuine issue as to any material fact and plaintiffs are entitled to judgment as a matter of law.

3. A statement of the material facts as to which there is no genuine issue is set forth in a memorandum of Points and Authorities which is annexed hereto in support of this motion for summary judgment.

For his response to defendant's motion to dismiss, the plaintiffs adopt the Memorandum of Points and Authorities submitted herewith.

Respectfully submitted,

/s/ Charles F. Wheatley, Jr.
CHARLES F. WHEATLEY, JR.
1203 Walker Building
Washington 5, D. C.

Attorney for Plaintiffs

* * * *

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1852-62

* * * *

STATEMENT UNDER RULE 9[h] TO ACCOMPANY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT—Filed August 23, 1962

In compliance with Rule 9[h] the plaintiffs submit the following statement of material facts as to which they contend there is no genuine issue.

1. The lands involved in this case are located within the Kenai National Moose Reserve, Kenai Peninsula, Alaska, established by Executive Order No. 8979 (6 F.R. 6471) [fol. 67] of December 16, 1941 by President Roosevelt. The Executive Order provided that none of the lands within the Reserve, with certain exceptions,

". . . shall be subject to settlement, location, sale or entry, or other disposition . . . under any of the public land laws applicable to Alaska . . ."

By Executive Order No. 10355 of May 26, 1952 (17 F.R. 4831) the President delegated to the Secretary of the Interior his power to modify the terms of outstanding withdrawals and reservations. Under Departmental Regulations (24 F.R. 1348, Departmental Manual §§ 200.2.1, 210.1, 210.1.2, 210.2.2A(4)(a)) the Secretary of the Interior has redelegated this power to the Under Secretary and certain Assistant Secretaries but has denied this power to the Solicitor or Deputy Solicitor of the Department.

2. On July 24, 1958 the Secretary of the Interior issued an order (published in the Federal Register of August 2, 1958, 23 F.R. 5883) relating to the Kenai National Moose Reserve which expressly provided:

"*Closed Area.* The following described lands within the boundaries of the Kenai National Moose Range, Alaska, *are not opened to oil and gas leasing*:" (Emphasis supplied.)

The lands listed as "not opened" were in the southern part of the Reserve. As to lands in the northern part of the Reserve, wherein the lands involved in this case lie, the order provided:

". . . lease offers . . . will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office of the Bureau of Land Management in Anchorage, Alaska. All lease [fol. 68] offers filed in that office on that day and until 10 A.M., on the tenth day thereafter will be treated as having been filed simultaneously. The priorities of all offers which conflict in whole or in part will be determined in accordance with the procedure outlined in the regulation 43 CFR 295.8."

The Management and map were noted on the records on August 4, 1958, so that the lands involved in this case first became open to lease offers thereunder on August 14, 1958.

3. Plaintiffs duly filed their respective offers to lease on or after August 14, 1958 in accordance with the procedure specified in the Secretary's Order of July 24, 1958, *supra*. Their applications were the first so received. On September 4, 1958 the Bureau of Land Management issued a "Notice of Public Drawing" to "determine priorities between simultaneously filed oil and gas lease offers," which specifically included plaintiff's applications. Subsequent to the drawing, plaintiffs remained the first lease applicants for the respective lands of those applicants filing after August 14, 1958 under the order of July 24, 1958.

4. However, the Anchorage Land Office rejected the plaintiffs' lease offers in October, 1959, on the ground that they conflicted with leases issued during the fall of 1958, based on offers filed between October 15, 1954 and January 28, 1955.

5. Plaintiffs duly appealed to the Director of the Bureau of Land Management where their appeals were denied in decisions rendered in July, 1960. Subsequently, plaintiffs duly appealed to the Secretary of the Interior. The Secretary never acted upon the appeals. Instead a deputy solicitor of the Department in an opinion dated [fol. 69] September 1, 1961 rejected plaintiffs' appeals on grounds not previously asserted by the Bureau of Land Management. The deputy solicitor concluded that the lands within the Kenai National Moose Reserve withdrawn by Executive Order No. 8979 of December 16, 1941 by the President were open to oil and gas leasing during 1954 and 1955 prior to the time that the Secretary of Interior had opened the lands by his order of July 24, 1958. The deputy solicitor confirmed the granting of leases within the Reserve based on the 1954 and 1955 offers, and for this reason rejected plaintiffs' offers.

6. Subsequent to the opinion by the deputy solicitor, plaintiffs duly filed a petition for exercise of supervisory authority with the defendant Secretary of the Interior pursuant to Departmental procedures for further consideration of the matter on the grounds (1) that newly discovered evidence substantiates the express language of the Executive Order that it was the intent of President Roosevelt in establishing the Kenai National Moose Re-

serve by Executive Order in 1941 that it be closed to oil and gas leasing under the Mineral Leasing Act; (2) that the deputy solicitor lacked authority to reject plaintiffs' appeals to the Secretary; and (3) that the deputy solicitor's purposed opinion conflicts with other decisions by Assistant Secretaries and other officers within the Department—a conflict which only the Secretary could resolve.

7. In a decision dated April 25, 1962, again signed by [fol. 70] the same deputy solicitor, plaintiffs' petition for exercise of supervisory authority, although considered on its merits, was denied.

8. Plaintiffs filed their present action in this court on June 8, 1962.

Respectfully submitted:

/s/ Charles F. Wheatley, Jr.
CHARLES F. WHEATLEY, JR.
1203 Walker Building
Washington 5, D. C.

Attorney for Plaintiffs

* * * *

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1882-62

* * * *

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—
Filed September 4, 1962

The defendant moves the Court for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9 of the Rules of this Court, on the grounds that there is no genuine issue as to any material fact and the defendant is entitled to judgment as a matter of law; that the action is barred by the statute of limitations, 30 U.S.C. 226-2, and that the complaint fails to state a claim for which relief can be granted.

This motion is based upon the complaint and its attached exhibits, referred to as appendices in the complaint, and the defendant's statement and counterstatement under Rule 9(h) of material facts as to which there is no gen-
[fol. 71] uine issue.

Respectfully,

/s/ Herbert Pittle

* * * *

Attorney, Department of Justice

Attorney for Defendant

* * * *

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1852-62

* * * *

DEFENDANT'S STATEMENT AND COUNTERSTATEMENT UNDER RULE 9(h) OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—Filed September 4, 1962

Pursuant to Rule 9(h) of the Rules of this Court, the defendant adopts as his statement of material facts the plaintiffs' statement of material facts, except those which have been controverted in defendant's response to plaintiffs' statement.

Respectfully,

/s/ Herbert Pittle

* * * *

Attorney, Department of Justice

Attorney for Defendant

* * * *

[fol. 72]

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1852-62

* * * * *

DEFENDANT'S RESPONSE TO PLAINTIFFS' STATEMENT OF MATERIAL FACTS—Filed September 4, 1962

The defendant controverts the following assertions contained in the plaintiffs' statement under Rule 9(h) [inadvertently referred to as "Rule 9(1)"], accompanying plaintiffs' motion for summary judgment:

1. Defendant controverts the statement in the last sentence of paragraph 1 that the Secretary of the Interior "* * * has denied this power [referring to powers delegated] to the Solicitor or Deputy Solicitor of the Department."

2. Defendant controverts the statement in the last sentence of paragraph 2, to the effect that the lands involved in this case first became open to lease offers on August 14, 1958.

3. Defendant denies the statement in paragraph 3 that the plaintiffs' applications were the first applications received for the lands involved in this case.

4. Defendant controverts the assertion in paragraph 5 that the Secretary of the Interior never acted upon the appeals filed by the plaintiffs.

5. Defendant controverts the statement in paragraph 6 that the plaintiffs "duly" filed a petition for exercise of supervisory authority with the defendant, pursuant to departmental procedure.

All of the assertions in the plaintiffs' statement under Rule 9(h) which are controverted by the defendant, as

set forth above, constitute plaintiffs' conclusions and argu-
[fol. 73] ment and are not statements of fact.

Respectfully,

/s/ Herbert Pittle
HERBERT PITTLE
Attorney, Department of Justice

Attorney for Defendant

* * * *

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1852-62

* * * *

MEMORANDUM—October 16, 1962

This matter having come before the Court on the 9th day of October, 1962 on the motions for Summary Judgment of Plaintiffs and Defendant, respectively, in the above entitled matter, the Points and Authorities submitted therewith, the respective statements of opposition filed thereto and the arguments advanced on hearing, and the Court having fully considered same and being fully advised in the premises, the Court concludes, there being no genuine issue of material fact, that the motion for summary judgment raised by the Defendant Udall should be and is, hereby granted and accordingly, the motions of the Plaintiffs Tallman, et al. for summary judgement should be, and are, hereby denied, except that part of the Defendant Udall's motion for summary judgment based on the grounds of non-compliance with the statute of limitations should not form part of the basis for the
[fol. 74] granting of Defendant Udall's motion for summary judgment and, accordingly, Defendant Udall's motion to dismiss is denied.

Counsel for the Defendant Udall will prepare and submit an appropriate order in conformity with the Court's ruling.

(signed) Charles F. McLaughlin
Judge

October 16, 1962

* * * *

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1852-62

* * * *

JUDGMENT—November 1, 1962

This case having come on for hearing on plaintiffs' motion for summary judgment and on defendant's motions to dismiss and for summary judgment, and the Court having heard argument of counsel and considered the material in support of the motions, and it appearing that there is no genuine issue of fact and that the defendant is entitled to judgment as a matter of law,

WHEREFORE, IT IS ORDERED as follows:

1. Defendant's motion for summary judgment is granted.
2. Defendant's motion to dismiss is denied.
[fol. 75] 3. Plaintiffs' motion for summary judgment is denied.
4. Judgment is hereby entered against the plaintiffs and in favor of the defendant and the complaint is dismissed.

Dated, this 1st day of November, 1962.

(signed) Charles F. McLaughlin
Judge
United States District
Court

* * * *

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1852-62

* * * *

NOTICE OF APPEAL—Filed December 31, 1962

Notice is hereby given this 31st day of December, 1962, that James K. Tallman, Alice P. Tallman, Christine Fleischer, William O. Rabourn, Harry B. Cockrum, Bailey E. Bell, James G. Carlson, Michael F. Beirne, James E. O'Malley and Waldo E. Coyle, plaintiffs, hereby appeal to the United States Court of Appeals for the District of Columbia from that part of the judgment of this Court granting defendant's motion for summary judgment and denying plaintiffs motion for summary judgment entered on the 1st day of November, 1962 in favor of defendant, Stewart L. Udall against said plaintiffs.

/s/ * * * *

CHARLES F. WHEATLEY, JR.
1203 Walker Building
Washington 5, D. C.

Attorney for plaintiffs

* * * *

[fol. 76]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[File Endorsement Omitted]

No. 17,598

JAMES K. TALLMAN, ET AL., APPELLANTS

v.

STEWART L. UDALL, Secretary of the Interior, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Mr. Charles F. Wheatley, Jr., with whom *Mr. Robert L. McCarty* was on the brief, for appellants.

Mr. Edmund B. Clark, Attorney, Department of Justice, with whom *Assistant Attorney General Clark*, *Messrs. S. Billingsley Hill* and *Herbert Pittle*, Attorneys, Department of Justice, were on the brief, for appellee. *Mr. Roger P. Marquis*, Attorney, Department of Justice, also entered an appearance for appellee.

OPINION—Decided September 19, 1963

Before WILBUR K. MILLER, BASTIAN and MCGOWAN, Circuit Judges.

BASTIAN, *Circuit Judge*: This is an appeal from summary judgment of the District Court in favor of the Secretary of the Interior in an action to review his decision [fol. 77] rejecting appellants' applications for oil and gas leases on land within the Kenai National Moose Range in Alaska.

Since appellants' main attack is on the Secretary's authority to draw various historical conclusions, the chronology of the creation of the moose range and its opening for oil and gas leasing is necessary.

The Kenai National Moose Range was established by Executive Order No. 8979 [1] of December 16, 1941. The order, which covered all but a small part of the subject lands, withdrew and reserved the area for the protection of the Kenai moose and provided that none of the lands:

> "shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926 . . . 44 Stat. 821, U.S.C., title 48, secs. 360-361, or the act of March 4, 1927 . . . 44 Stat. 1452, U.S.C., title 48, secs. 471-471o."

Subsequently, Public Land Order No. 487 [2] of June 16, 1948, withdrew the portion of the subject lands excepted by the 1941 Executive Order.

Between October 15, 1954, and January 28, 1955, certain parties filed applications for oil and gas leases on lands covered by the 1941 and 1948 orders. No immediate action was taken on these applications because, in 1953, the Director of the Bureau of Land Management had sus- [fol. 78] pended action on all *pending* oil and gas lease offers until completion of a study of possible changes in policy and regulations related to the issuance of oil and gas leases within wildlife refuges. Ultimately, these parties were awarded leases on the land in question.

In 1955 the Government began to restore the Kenai National Moose Range to certain private acquisition. First, Public Land Order No. 487 was revoked by Public Land

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[1] 6 Fed Reg. 6471.

[2] 13 C.F.R. 3462. The order stated:

> "Subject to valid existing rights, the public lands [described] in Alaska are hereby temporarily withdrawn from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation.
>
> "This order shall take precedence over, but shall not modify . . . the reservation for the Kenai National Moose Range made by Executive Order No. 8979 of December 16, 1941. . . ."

Order No. 1212 [3] of September 9, 1955, which provided initially that a small piece of land (not involved in the present suit) was:

> "2. Subject to valid existing rights . . . withdrawn from all forms of appropriation under the public-land laws, including the mining but not the mineral-leasing laws, and reserved under the jurisdiction of the Bureau of Land Management, Department of the Interior, for recreational purposes. . ."

The order then proceeded to deal with the remainder of the land restored. After granting preference for homesteading, it provided:

> "6. Any of the lands described in paragraphs 4(a), 4(b) or 4(d) of this order then remaining unappropriated, shall become subject to such application, petition, selection, or other form of appropriation by the public generally as may be authorized by the public-land laws, including the mineral-leasing laws . . . .
>
> "7. Commencing at 10:00 a.m. on the 182nd day after the date of this order, any of the unsurveyed lands described in paragraph 4(c) not settled upon by veterans or other persons entitled to credit for service shall become subject to settlement and other forms of appropriation by the public generally, including leasing under the mineral-leasing laws . . . ."

On October 4, 1955, Public Land Order No. 1212 was amended [4] to delete the provisions for leasing under the [fol. 79] mineral-leasing laws appearing in paragraphs 6 and 7 of the order.

Finally, on January 8, 1958, an amendment to 43 C.F.R. 192.9 [5] provided:

> "(b) *Leasing policy and procedure.* * * * (3) As to . . . Alaska wildlife areas, representatives of the

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[3] 20 Fed. Reg. 6795.

[4] 20 Fed. Reg. 7904.

[5] This regulation provided a comprehensive plan for oil and gas leasing of wildlife refuge lands, including the Kenai National Moose Range.

appropriate office of the Bureau of Land Management and the United States Fish and Wildlife Service will confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing. . . .

"(4) The remaining lands . . . not closed to oil and gas leasing will be subject to leasing. . . .

"(c) *Publication and filing of agreements; filing of lease offers.* The agreements referred to in paragraph (b) (3) of this section shall be published in the FEDERAL REGISTER. . . . The agreements, as supplemented by maps or plats specifically delineating the lands will be filed in the appropriate land offices of the Bureau of Land Management. . . . Lease offers for such lands will not be accepted for filing until the tenth day after the agreements and supplemental maps or plats are noted on the land office records."

The Bureau of Land Management and the Fish and Wildlife Service concluded their agreement and it was approved by the Secretary of the Interior. The order of the Secretary was published on August 2, 1958 [6] designating the lands in the Moose Range which were not subject to oil and gas leasing, and providing that the balance of the lands within the Range were subject to the filing of oil and gas lease offers. The order stated:

"Offers to lease covering any of these lands which have been pending and upon which action was sus-
[fol. 80] pended . . . will now be acted upon and adjudicated in accordance with the regulations."

The order also stated that all lease offers filed within ten days after the date established by regulations 43 C.F.R. 192.9 for acceptance for filing would be treated as simultaneously filed, and further:

"The priorities of all offers which conflict in whole or in part will be determined in accordance with the

[6] 23 Fed. Reg. 5883.

procedures outlined in the regulation 43 C.F.R. 259.8." [7]

On or after August 14, 1958, appellants filed their respective offers to lease[8] pursuant to § 17 of the Mineral [fol. 81] Leasing Act, as amended, 30 U.S.C. § 226 (Supp. III, 1958).

Some time after appellants' applications had been filed, the Department of the Interior, without notice to appellants, issued leases for the lands in question to the representatives of major oil companies based on offers filed by them between October 15, 1954, and January 28, 1955, as above stated.

On September 4, 1959, a little more than a year after the filing of appellants' offers, a public drawing was held to determine the priorities between simultaneously filed oil and gas lease offers pursuant to the provisions of 43 C.F.R. 295.8. Appellants prevailed in this public draw-

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[7] 43 C.F.R. 295.8: "*Processing of simultaneous applications.* All applications, which term includes offers to lease, filed pursuant to the regulations in any part of this chapter will be regarded as having been filed simultaneously within the meaning of this section where by reason of an order of restoration or opening, or a notice of the filing of a plat of survey or resurvey, they are filed in the manner and within the period of time for the filing of simultaneous applications provided for in such order or notice. . . .

* * * *

"(b) All such applications which conflict in whole or in part will be included in a drawing which, except as provided in paragraph (c) of this section will fix the order in which the applications will be processed.

"(c) All applications included in the drawing will be subject to any priority to which any particular applicant may be entitled on account of a preference right conferred by law or regulations."

[8] All of the appellants, except Waldo E. Coyle, filed their offers for land covered by Executive Order No. 8979 of December 16, 1941. Coyle filed an offer for land originally excluded by that order but subsequently included in Public Land Order No. 487 of June 16, 1948. The land covered by the 1948 order was opened to oil and gas leasing by Public Land Order No. 1212 of September 9, 1955, as modified by the amendment of October 14, 1955. The applicants awarded priority over Coyle filed their offers prior to Order No. 1212, so the question presented by Coyle is whether Order No. 487 closed the land to oil and gas leasing.

ing, in which the oil companies were not represented. But their victory was short-lived, for their lease offers were rejected by the Anchorage Land Office on the grounds that they conflicted with the leases issued the previous fall.

Appellants duly appealed to the Director of the Bureau of Land Management, where their appeals were denied in decisions rendered in July, 1960. Appeals from these decisions were taken to the Secretary of the Interior and were rejected by a deputy solictor of the Department in an opinion dated September 1, 1961, granting leases within the Range based on the 1954 and 1955 offers. A petition for the exercise of supervisory authority by the Secretary of the Interior was filed on February 15, 1962. This petition was denied *on the merits* on April 25, 1962.

Thereafter, and on June 8, 1962, appellants filed this suit in the District Court against the Secretary of the Interior. The Secretary first filed a motion to dismiss based on the ninety-day statute of limitations contained in 30 U.S.C. § 226-2 (Supp. III, 1958). Then both sides moved for summary judgment. The District Court granted the motion of the Secretary for summary judgment and denied the motions of appellants for summary judg-
[fol. 82] ment, specifically stating that the ground of noncompliance with the statute of limitations did not form a part of his decision, and further specifically denying the Secretary's motion to dismiss based, as stated, on the ninety-day statute of limitations. Appellants appealed to this court on December 31, 1962.

Appellant's principal contention is that the 1941 Executive Order closed to oil and gas leasing the land in the Kenai National Moose Range covered by that directive, and that this land remained closed until it was opened by the amendment of 43 C.F.R. 192.9 in January 1958. They argue that the order prohibits "disposition [of any lands within the Range] (except for fish trap sites) under any of the public-land laws applicable to Alaska," and, since the Mineral Leasing Act of 1920, 41 Stat. 437, as amended, is a "public-land law applicable to Alaska," it follows that oil and gas leasing under that Act is prohibited.

We think the Executive Order clearly did remove the land involved from oil and gas leasing and appellants' contention in this regard is correct. And there is no doubt that the Mineral Leasing Act of 1920 is a public-land law applicable to Alaska.[9]

The Secretary argues, however, that the acts of July 3, 1962, and March 4, 1927, specifically included in the 1941 order, are also public-land laws applicable to Alaska, and that, consequently, the order could not have been designed to include all such public-land laws but only those laws relating to the complete alienation of the title of the United States in the land. The Secretary argues that, since the Mineral Leasing Act does not provide for the alienation of the title of the United States, and since the order did not expressly withdraw the lands from the operation of that Act, the land covered by the 1941 order was open to oil and gas leasing in 1954 and 1955, when the offers conflicting with appellants' offers were filed.

[fol. 83] There are persuasive counter-arguments to the Secretary's contentions. As the deputy solicitor himself noted, the acts specifically included in the Executive Order, unlike the Mineral Leasing Act, are not public-land laws of general applicability throughout the United States but are laws applicable only to Alaska. We think the phrase "public-land laws applicable to Alaska" means those laws of general applicability throughout the country which are made applicable to Alaska by the act of August 24, 1912, 37 Stat. 512, 48 U.S.C. 23, 43 C.F.R. 51.1; otherwise, the order would not have included the two acts specifically mentioned.

The specific exemption for fish trap sites in the order strengthens our conviction. If the order were designed to cover only the total alienation of the interest of the United States, then specification of fish trap sites would be unnecessary, for permission to fish by traps is acquired not by deed but by a license, similar in many respects to a lease. Furthermore, the specific inclusion of one exception in the order indicates that other exceptions should not be implied (as the Secretary urges) but that

[9] 43 C.F.R. 71.1 (1954).

the prohibition on disposition should be read in an expansive manner.

Appellants make copious reference to the Pickett Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 141, pointing out the similarity between the wording of that statute and the Executive Order of 1941 and the Public Land Order of 1948. Using this evident similarity, they urge that the cases which have construed the Pickett Act to permit the President to withdraw public lands from oil and gas leasing[10] also provide judicial interpretation of the 1941 and [fol. 84] 1948 orders. The cases dealing with the Pickett Act certainly are not dispositive of the question before us, but they are not wholly irrelevant since they do indicate that it is more likely that these words were used to provide expansive coverage rather than the narrow coverage the Secretary now urges.

In sum, we hold, as to all appellants other than Coyle, that the lands in the Kenai National Moose Range were closed to oil and gas leases by the terms of the order creating the Range in 1941 until it was opened on August 2, 1958. Accordingly, the leases issued to parties other than those appellants were a nullity because applications therefor were filed prior to the opening of the Range to leasing. While the lands filed on by appellant Coyle present a somewhat different picture from those of the other appellants, no material difference exists between his claim and theirs. The lands on which Coyle filed were originally opened by the 1941 order, but they were closed in 1948 by Order No. 487 and remained closed during the time the offer conflicting with his application was filed. These excepted lands were reopened by Order No. 1212 on September 9, 1955, but no new offers were filed thereafter on the lands covered by the Coyle application. As to the lands filed on by Coyle, we hold that the leases issued to parties other than Coyle were a nullity because applications therefor were filed prior to the opening of the Range to oil and gas leasing.

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[10] *Bourdieu* v. *Pacific Western Oil Co.*, 299 U.S. 65 (1936); *Wilbur* v. *United States* ex rel. *Barton*, 60 App.D.C. 11, 46 F.2d 217 (1930) aff'd sub nom. *United States* ex rel. *McLennan* v. *Wilbur*, 283 U.S. 414 (1931).

In reversing the Secretary's interpretation of the 1941 order creating the Kenai National Moose Range, we are aware of the discretion granted agencies in the interpretation of statutes and presidential orders in areas committed to their administration. Deference to agencies does not reach the extent of sanctioning irrational agency action, however; nor does it permit an agency to frustrate judicial review by issuing a series of confusing and possibly conflicting orders, and then urging that the gen- [fol. 85] cy's resolution of the confusion and conflict is not unreasonable since no resolution of such confusion could be called unreasonable. In the case before us the Secretary's interpretation of the 1941 order seems to us unreasonable and should not stand.

The Secretary concedes that, if this court determines that any of the orders closed the Moose Range to oil and gas leasing, the only possible defense would be based on 30 U.S.C. 226-2, which provides:

> "No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter."

Admittedly, appellants commenced this action more than five months after the order of the deputy solicitor, acting for the Secretary of the Interior, was filed. However, on April 25, 1962, the Secretary entertained and denied appellants' petition for the exercise of supervisory authority; and the present action was filed within ninety days thereafter. The Secretary argued before the District Court, and again argues before us, that the ninety-day statute of limitations bars this action.

We think the Secretary's reliance on the statute of limitations is without merit. The principle which governs this question is set down in *Outland* v. *Civil Aeronautics Bd.*, 109 U.S.App.D.C. 90, 284 F.2d 224 (1960).[11]

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[11] See also *Montship Lines* v. *Federal Maritime Board*, 111 U.S. App.D.C. 160, 295 F.2d 147 (1961). *Safeway Stores* v. *Coe*, 78 U.S.App.D.C. 19, 136 F.2d 771 (1943) is not in point, for in that case the Secretary did not lose his jurisdiction to decide on the merits the question presented in the petition.

When a party elects to seek a rehearing there is always the possibility that the order complained of will be modified in a way which would render judicial review unneces-
[fol. 86] sary. Practical considerations, therefore, dictate that, when a petition for rehearing is filed, judicial review may be properly deferred until the petition has been acted upon. We hold, in the circumstances presented here, that the time for filing a petition for judicial review did not begin to run until the petition for rehearing had been acted upon.

The Secretary argues that this rule applies "only where the rules of practice of an administrative agency provide for a petition for rehearing or reconsideration and when one is timely filed." He argues that "there is no provision by statute or regulation permitting, much less giving, the right to file a petition for reconsideration [of a decision by the deputy solicitor]." A petition to the Secretary for the exercise of supervisory authority is a long standing procedure within the Department of the Interior, which, although not spelled out by statute or regulation, serves many of the same purposes of a petition for rehearing.

The Secretary correctly points out that he has the right to exercise his supervisory power so long as the property in question remains within his jurisdiction. Thus he argues that the time for petitioning for the exercise of his supervisory power might be limitless and the provisions of 30 U.S.C. 226-2 rendered nugatory, for a party losing a decision in the Department could delay his entry into court indefinitely by delaying his petition for the exercise of supervisory power. This argument fails to consider the power of the Secretary to formulate his own rules concerning the submission of the petition. The Secretary can prevent undue delay by setting time limits on these petitions. He is not at the mercy of the losing party, but he can force that party, by appropriate rules or adjudication, to bring petitions for the exercise of supervisory power within a certain time.

In the present case, the Secretary did not reject ap-
[fol. 87] pellants' petition because it was filed too late, but, rather, he rejected it on the merits. The letter rejecting

appellants' petition cannot be read as "an orderly manner of indicating that the [original] communication had been received," but must be read as a rejection of the petition on the merits. Under the circumstances, we believe that appellants may seek review of the order of the Secretary within ninety days after the final rejection of their application on the merits. This they have done.

A different result might well be reached had the Secretary rejected appellants' petition for the exercise of supervisory authority on the ground that it was filed too late; but, as stated, he did consider it and denied it on the merits.

It follows that the action of the District Court should be reversed, and judgment entered for appellants.

Reversed

McGOWAN, *Circuit Judge*, with whom *Circuit Judge* WILBUR K. MILLER joins, *concurring*: We concur fully in the reasons set forth by Judge Bastian for the reversal of the judgment of the District Court. We believe, however, that there is an additional ground why the appellee may not, in this court, press the claim that the statute of limitations bars the relief sought by appellants.

It is clear, in our view, that the District Court passed upon the statute of limitations point adversely to the appellee. The record shows that two separate motions were filed in the District Court by the appellee: one, a motion for summary judgment on the merits, in which was included a statute of limitations ground, and, two, a motion to dismiss the complaint based solely upon the statute of [fol. 88] limitations. In its memorandum opinion granting the first such motion, the District Court expressly excepted "that part of the Defendant Udall's motion for summary judgment based on the grounds of non-compliance with the statute of limitations . . .," and stated that that part "should not form part of the basis for the granting of Defendant Udall's motion for summary judgment and, accordingly, Defendant Udall's motion to dismiss is denied." In the judgment subsequently entered pursuant

to this memorandum, the ordering portions recited explicitly that "Defendant's motion to dismiss is denied." The appellee has taken no appeal from this part of the judgment adverse to him.

In the absence of such an appeal, we do not believe that appellee is free to raise the statute of limitations here as a basis of affirmance. Our conclusion in this regard rests on authority of long standing. In *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185 (1937), Justice Cardozo, speaking for a unanimous court, said that "[T]he rule is inveterate and certain." There, the plaintiff surety had sought specific performance of a contract supplemented to an agreement of suretyship, or, alternatively, exoneration by the contractor of the surety from loss on unpaid bills. The District Court held the surety not entitled to the specific performance requested, but did grant the relief of exoneration. It entered a decree reflecting these dispositions. The contractor appealed from the grant the exoneration, but no cross-appeal was taken by the surety from the denial of specific performance. The Court of Appeals concluded that specific performance, rather than exoneration, was the proper relief and sent the case back with directions to the District Court to revise its judgment to this end.

The Supreme Court held that it was error for the Court of Appeals to take this action at the instance of a non-appealing, albeit successful, litigant. It cited a number [fol. 89] of cases, including an early decision of the Supreme Court, wherein it was said:

> "Where each party appeals each may assign error, but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken." *The Maria Martin;* 12 Wall. 31, 40-41.

One of the cases relied upon by Justice Cardozo was *Peoria & Pekin Union Ry. Co.* v. *United States*, 263 U.S. 528 (1924). There, the United States had prevailed below

on the merits, but it had also contended in the lower court that the venue was improperly laid. This latter point was resolved against it, but on appeal it was renewed. Justice Brandeis, speaking for the entire court, said (at p. 536) that ". . . by failure to enter a cross appeal from the court's action in overruling its objection, the right to insist upon it here was lost. The appellees can be heard before this Court only in support of the decree which was rendered."

This court has recognized this principle. In *Wisconsin Bankers Association* v. *Robertson*, 111 U.S.App.D.C. 85, 294 F.2d 714, *cert. denied*, 368 U.S. 938 (1961), the case was litigated below both on the merits and on a challenge to plaintiff's standing to sue. The defendants pervailed on the former, but suffered an adverse ruling on the latter. The standing point was renewed on appeal, but this court said: "As a cross appeal was not filed by the appellees, we cannot consider, and therefore express no opinion concerning, their argument that the District Court erred in holding that appellants had standing to sue. In the absence of a cross appeal, an 'appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary . . .' *United States* v. *American Ry. Exp. Co.*, [fol. 90] 1924, 265 U.S. 425, 435, 44 S.Ct. 560, 564, 68 L.Ed. 1087 . . . ."[1] See also, *Whitehead* v. *American Securtiy & Trust Co.*, 109 U.S.App.D.C. 202, 285 F.2d 282 (1960).

It may seem anomalous at first blush that a successful litigant in the lower court should be under any necessity

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[1] 111 U.S.App.D.C. at 86, 294 F.2d at 715. The *Railway Express* case appears to have involved a situation where the lower court did not in fact decide or pass upon the ground sought to be raised on appeal. In this situation the successful litigant may well be able to renew the point on appeal as a basis of affirmance. Justice Brandeis reaffirmed the force of the *Peoria & Pekin Union Ry.* holding by this reference (n.11 on p. 436 of 265 U.S.): ". . . There the objection upon which the appellee relied was one of venue. The District Court overruled it; and then dismissed the bill on the merits. An objection to venue can be waived at any stage of the proceedings. This Court held that it was waived by failure to take a cross-appeal."

whatsoever of appealing from the decree which brought him victory. But the judgment may, as here, be comprised of several elements, adverse as well as favorable. If the prevailing party wishes to rely on appeal on a contention decided against him, he must preserve his rights by an appeal. This can be by a cross-appeal if time permits after his opponent has appealed, or it may be by a timely notice of appeal which can be dismissed if the other party elects not to pursue the litigation further. In the absence of such a preservation of the point, the successful litigant must be taken to have regarded the grounds upon which he won as so strong that he is content to rely upon them alone in the appellate proceedings.

The defense of the statute of limitations is not jurisdictional and it may be waived at any time. By failing to appeal from the denial of his motion to dismiss founded upon the statute, the appellee here made such a waiver and cannot now attack that part of the judgment with which he disagrees.

[fol. 91]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

* * * *

No. 17,598

Civil 1852-62

[File Endorsement Omitted]

JAMES K. TALLMAN, ET AL., APPELLANTS

v.

STEWART L. UDALL, Secretary of the Interior, APPELLEE

Appeal from the United States District Court
for the District of Columbia.

Before: Wilbur K. Miller, Bastian and McGowan, Circuit Judges.

JUDGMENT—Dated: September 19, 1963

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment—of the District Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby, remanded to the District Court with directions to enter judgment for appellants.

Per Circuit Judge Bastian.

Separate concurring opinion by Circuit Judge McGowan in which Circuit Judge Wilbur K. Miller joins.

[fol. 92] [File Endorsement Omitted]

* * * *

[fol. 93]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17598

[Title Omitted]

PETITION FOR REHEARING—filed September 30, 1963

On September 19, 1963, this Court handed down a decision in the above-entitled appeal adverse to the Secretary of the Interior. The Secretary respectfully requests a rehearing by the Court and submits the following in support thereof:

1. This Court held, contrary to the Secretary's decision, that Executive Order No. 8979 of December 16, 1941, 6 Fed. Reg. 6471, providing that none of certain lands in the Kenai Peninsula, Alaska, "shall be subject to settlement, location, sale, or entry, or other disposition * * * under any of the public-land laws applicable to Alaska * * *," closed said lands to the filing for and issuance of oil and gas leases under the Mineral Leasing Act.

2. Pending before this Court are consolidated cases Nos. 17,358, 17,397, and 17,403-17,409, *Bert F. Duesing, et al.* v. *Stewart L. Udall.* These cases have been set for argument October 1, 1963. The oil and gas lease applications involved therein cover land included within the above-mentioned Executive Order and were filed during the period this Court has held the land was not open for [fol. 94] filing. Accordingly, those cases are subject to summary affirmance under this Court's decision in this case.

3. We have consented to a postponement of the argument in the *Duesing* cases and file this motion for re-

hearing in order that appellants in those cases, as well as the Government, may have the opportunity to present their views with respect to the decision in this case before it becomes final, so as to eliminate any possibility of conflicting decisions by this Court on the same subject. Copies of this petition are being served on counsel for appellants in the *Duesing* cases.

4. Moreover, there is a question as to the extent to which the opinion might jeopardize investments in producing oil wells made under leases applied for during the period in question which requires both careful analysis of the opinion and investigation as to facts of such production. This matter is now under investigation by the Department of the Interior but since it involves, *inter alia*, ascertainment of the amount of revenue that has been paid to the States of Alaska, it is not yet completed. This petition will be supplemented when the investigations are complete.

Respectfully submitted.

RAMSEY CLARK,
Assistant Attorney General.

ROGER P. MARQUIS,
EDMUND B. CLARK,
Attorneys, Department of Justice,
Washington, D.C. 20530.

SEPTEMBER 1963.

[fol. 95] CERTIFICATE OF COUNSEL

I, Edmund B. Clark, counsel for appellee in the above-entitled cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

.....

EDMUND B. CLARK
Attorney, Department of Justice
Washington, D.C. 20530

CERTIFICATE OF SERVICE [Omitted in printing]

[fol. 96]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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* * * *

No. 17,598

[File Endorsement Omitted]

[Title Omitted]

Before: Wilbur K. Miller, Bastian and McGowan, Circuit Judges, in Chambers.

ORDER DENYING PETITION FOR REHEARING—
October 16, 1963

On consideration of appellee's petition for rehearing, and of appellants' answer thereto, it is

ORDERED by the court that the petition is hereby denied.

Per Curiam.

[fol. 97]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,598

[File Endorsement Omitted]

[Title Omitted]

MOTION FOR LEAVE TO FILE—filed November 2, 1963

The Secretary of the Interior, appellee in the above-entitled case, respectfully requests leave to file the attached Motion for Reconsideration and sets forth the following reasons therefor:

1. At the time the Secretary filed his petition for rehearing, he advised that certain supplemental information would be filed as soon as available. However, the petition for rehearing was denied before the information could be assembled and put in the form of a supplemental memorandum. We believe it highly desirable that all the information, and the arguments based thereon, be placed before this Court for its consideration.

[fol. 98] 2. The Secretary lodged the motion for consideration with the Clerk for filing on October 24, 1963. On October 28, the Deputy Clerk returned the motion with the attached letter, advising that there was no provision for filing a second motion for reconsideration. This was the first such motion.

For the foregoing reasons, we respectfully request leave to file the attached motion for reconsideration.

/s/ Ramsey Clark
Assistant Attorney General
/s/ Roger P. Marquis
/s/ Edmund B. Clark

Attorneys, Department of Justice
Washington, D.C., 20530

OCTOBER 31, 1963.

CERTIFICATE OF SERVICE [Omitted in printing]

[fol. 99]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,598

[File Endorsement Omitted]

[Title Omitted]

MOTION FOR RECONSIDERATION OF DENIAL OF PETITION FOR REHEARING—filed November 8, 1963

The Secretary of the Interior respectfully moves this Court to reconsider its denial, dated October 16, 1963, of the Secretary's Petition for Rehearing in the above-entitled appeal. In his Petition for Rehearing, the Secretary advised that a supplemental memorandum would be submitted in support of the Petition for Rehearing as soon as certain supplemental information was available. The supplemental information has been obtained and the memorandum prepared for filing. However, before the memorandum could be filed, the Petition for Rehearing was denied. Our analysis of the decision, particularly in view of facts which now appear, makes it clear, we believe, that the judgment is erroneous and should not stand [fol. 100] for reasons to be developed herein. Moreover, it is desirable that all of the information shall have been placed before this Court for its consideration.

1. The opinion of this Court discloses an inconsistency of substantial importance which warrants a reconsideration of the decision. Thus, the Court held "that the lands in the Kenai National Moose Range were closed to oil and gas leases by the terms of the order creating the Range in 1941 until it was opened on August 2, 1958" (Slip Opinion, p. 9). The 1941 order was a withdrawal by the President of the United States. The Secretary of the Interior has no authority, in his own right, to withdraw public lands or to modify or revoke withdrawals, except in those few instances (not here involved) where Congress has authorized him to do so. The President has

delegated to the Secretary his authority to withdraw and to modify or revoke withdrawals. However, that delegation was subject to certain limitations, the most important limitation, for purposes of this case, being (Executive Order 10355 of May 28, 1952, 17 Fed. Reg. 4831):

> All orders issued by the Secretary of the Interior under the authority of this order shall be designated as public land orders * * *.

[fol. 101] The notice published August 2, 1958, does not relate to the 1941 Executive Order, does not purport to be a modification of it, and is not designated as a Public Land Order. On the contrary, the 1958 notice was merely notice that the 1953 suspension order directed by the Secretary had been lifted. And it must be recalled that the 1953 suspension order was based on the supposition that the Range was not closed to oil and gas leases by the 1941 order. This Court's decision is, of course, that the 1953 order and all supplemental regulations pursuant thereto were void for lack of authority. It should likewise follow that the 1953 order was null and void. Yet for some unstated reason, this Court says the 1958 notice is valid.

Moreover, as construed by this Court, the 1958 notice is void because it was not designated a Public Land Order. The distinction between a Public Land Order and the 1958 notice that the 1953 suspension had been lifted is not a mere technical one. The Public Land Order was required when the Secretary was exercising a power specifically delegated by the President, as distinguished from the exercise of a power generally his because of his authority as custodian of the public lands. The Secretary was well aware of this distinction in this instance. This is shown by his designation as Public Land Orders the [fol. 102] two orders, 487 and 1212, which were clearly modification and revocation of withdrawals. By their very terms, Public Land Orders under the delegated power from the President have a dignity and importance beyond that of the ordinary Secretarial regulations.

It is thus clear that, if the Range was closed to oil and gas leases by the 1941 order, it is still closed and appellants' action should be dismissed.

2. The fact that the lessees whose leases this Court has declared nullities were not parties to the litigation was before the district court and this Court. We have many times urged upon this Court the argument that this type of action against the Secretary cannot be decided in the absence of the lessee who is an "indispensable party." See *Southwestern Petroleum Corporation* v. *Udall*, No. 17,545, argued October 8, 1963, for the most recent occasion. One of the difficulties always presented is that we consider it inappropriate for us, on behalf of the Secretary, to urge facts or equities which may favor such a lessee. In this instance, one of the lessees filed with this Court a brief *amicus curiae* setting forth his interests in detail. Undoubtedly he and other lessees are not bound by [fol. 103] the decision and there is every reason to suppose that they would object and file an action to prevent the Secretary from cancelling their leases.[1]

The decision in this case does not, in terms, direct cancellation of the leases which this Court has declared to be nullities. Perhaps this is *sub silentio* recognition by this Court of the problem of the indispensable party doctrine. Cf. *Barash* v. *Seaton*, 103 U.S.App.D.C. 159, 256 F.2d 714 (1958), where this Court took jurisdiction, yet specifically refused to order cancellation, leaving the case in limbo. But what is the district court to do? Entry of a judgment declaring the leases a nullity will accomplish nothing because the lessee is not bound. Directing reinstatement of the appellants' offers, which is what appellants sought in their complaint, also creates problems because the Secretary cannot grant the applications without cancelling the existing leases. Mere reinstatement of the applications gives appellants nothing. The only other alternative would be the issuance of conflicting

[1] Since all the lessees are in fact assignees of the original lessee and presumably bona fide purchasers, there is at least a question whether the Secretary can or should act to adversely affect their interest. See 30 U.S.C. sec. 184.

leases. Thus, it appears that the decision, unless clarified, does no more than create further litigation.

[fol. 104] We submit that, because of the incongruous situation created by the absence of the lessees, a reconsideration of the entire matter is justified, and we now present further information and argument based thereon which, we believe, require reversal of the decision. In any event, we submit that the judgment of this Court should be clarified specifically to state what relief is contemplated.[2]

3. This Court was aware at the time of its decision in the above-entitled appeal that the Secretary of the Interior had interpreted Executive Order No. 8979 of December 16, 1941, as not withdrawing the Kenai National Moose Range from the operation of the Mineral Leasing Act in the only two cases where opinions were published on the issue. The Court was also aware that the entire series of regulations and orders from 1948 to date (Slip Opinion, pp. 2-6) was based upon that interpretation.

In answer to this line of administrative construction, the Court stated only that (Slip Opinion, pp. 9-10):

[fol. 105] Deference to agencies does not reach the extent of sanctioning irrational agency action, however; nor does it permit an agency to frustrate judicial review by issuing a series of confusing and possibly conflicting orders, and then urging that the agency's resolution of the confusion and conflict is not unreasonable since no resolution of such confusion could be called unreasonable.

The Court did not point out what it felt was confusing or conflicting about the series of orders. One thing is perfectly clear and the Court does not deny it. All of the orders and regulations were consistent with the Secretary's interpretation of the 1941 Executive Order, i.e., that the Range was at all times open for leasing under

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[2] Only upon such clarification will it become plain whether there has been a final adjudication so that the case would be ripe for Supreme Court review.

the Mineral Leasing Act. Moreover, the action taken by the Secretary in actually issuing leases is further demonstration of the consistency of his interpretation and the rights and interests of many parties not party to this litigation have been affected by those actions.[3]

[fol. 106] Actual practice has revealed that at least 21 leases were issued prior to August 2, 1958. As of the present time, there are 127 producing leases and leases committed to production, all of which were issued pursuant to offers filed prior to August 2, 1958. Some 21 of these leases had, by July 31, 1963, produced 23,506,519 barrels of oil and 482,248,000 cubic feet of gas, upon which $7,296,922.72 has been paid to the United States in royalties. This figure does not include rentals. In addition, 351 leases upon which production has not yet started have been issued pursuant to applications filed prior to August 2, 1958. Production on the Moose Range is the only production in Alaska on leases issued under the Mineral Leasing Act.

Furthermore, 90% of all revenues from oil and gas on public land, including rentals as well as royalties, have been and are being paid to the State of Alaska. Sev-
[fol. 107] eral hundred thousand dollars have been paid annually to the State in rentals alone. These revenues constitute a substantial portion of the State's income and cessation of the payments even for a temporary period would be a crippling blow to this new State's economy.

Apart from the general confusion caused by the decision declaring the leases nullities, the Department of the Interior will be faced with serious problems concerning the value of this past production from such leases and additional problems as to the rights of lessees to secure refunds of royalties and rentals. Regardless of what solutions may be found for these problems, it is not an exaggeration to say that further litigation is clearly predictable.

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[3] So far as we can see, the only confusion that exists arises from failure to understand the reasons for specific and somewhat unusual details due to the fact that a wildlife refuge is involved. Thus, the 1953 suspension order was supplemented by regulations allowing the issuance of leases under certain circumstances and carefully prescribed conditions for operation.

Clearly, the interests of many parties, including the States of Alaska, none of whom were parties to this litigation, have been based upon reliance on the Secretary's consistent interpretation of the 1941 Executive Order. Indeed, it is well to bear in mind that there was no way for anyone desirous of developing the resources of the public land in Alaska to do so save by relying on the Secretary's actions because he is entrusted with the care and management of these lands.

[fol. 108] It is for this reason that the Secretary's interpretations made within the scope of his duties must be given such great weight. As this Court reiterated in its decision in another case handed down two weeks after the instant decision, *LaRue* v. *Udall*, No. 17,711, decided October 3, 1963 (Slip Opinion, p. 8):

> We have carefully considered all the other contentions made by appellants, but do not find in them any reason for disturbing the Secretary's decision. As we said in Safarik v. Udall:
>
> > "It is obvious that the Secretary of the Interior in carrying out his functions in the administration and management of the public lands, must be accorded a wide area of discretion and it is a well-recognized rule that administrative action taken by him will not be disturbed by a court unless it is clearly wrong."

We do not now reargue the correctness of the Secretary's decision as an initial matter. We have done that in our original brief. We now request the Court to reconsider its holding that "the Secretary's interpretation of the 1941 order seems to us unreasonable and should not stand" (Slip Opinion, p. 10). This Court's discussion of the Secretary's reasons for his interpretation demonstrates that there was a not unreasonable basis for it. In fact, this Court's introduction of its reasons for disagreeing with the Secretary—"There are persuasive counter-arguments to the Secretary's contentions" (Slip Opin-
[fol. 109] ion, p. 8)—indicates that there were arguments to be advanced in favor of the Secretary's decision. It follows that his decision was not arbitrary. Particularly

because of the many intervening rights based upon actions of the Secretary and the expenditures made in reliance upon his actions, we submit that his interpretation should not have been overturned. As was stated by the Supreme Court in *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 472-473 (1915):

> 2. It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.

We submit that the usage and practice of the Secretary of the Interior with respect to issuance of oil and gas [fol. 110] leases on the Kenai National Moose Range prior to August 2, 1958 (at least 21 leases in 1954 and 1955), and issuance subsequent to that date based on applications filed prior thereto (more than 350 leases), are precisely the type of usage and practice referred to in the above-quoted statement of the Supreme Court. An analogous principal of the law as applied to a court decision is that it becomes a rule of property which will not be retroactively disturbed when there has been reliance thereon. *United States* v. *Title Ins. Co.*, 265 U.S. 472, 484 (1924). Nowhere did this Court indicate that it had really considered or given weight to the consistent administrative construction by the Secretary of the 1941 Executive Order.

[fol. 111] 4. As further demonstration of the validity of the Secretary's interpretation and his consistent practice under it, there is more than the presumption referred to in *Midwest Oil, supra,*

"that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice." Here, the specific actions were called to the attention of Congress and ratified some five years prior to the Secretary's decision in this case. In connection with proposed legislation during the 84th Congress concerning wildlife refuges, the Subcommittee of the Senate Committee on Interstate and Foreign Commerce and the House Committee on Merchant Marine and Fisheries were informed that 21 oil and gas leases had been issued on the Kenai National Moose Range in 1954 and 1955. The House Committee was advised of the 1947 regulation governing the issuance of oil and gas leases on refuge lands (12 Fed. Reg. 7324, 43 C.F.R., 1949 ed., 192.9) and the order of August 31, 1953, suspending action on all pending offers.[4]

[fol. 112] The House Committee submitted a report concluding that the suggested procedures for protecting wildlife refuges would be impractical but continued (H. Rept. No. 1941, 84th Cong., 2d sess.):

> Hence it was decided to try, for an experimental period of time, an arrangement between the Secretary of the Interior and the committee under which each proposed alienation or relinquishment of any interest the Fish and Wildlife Service has in lands under its jurisdiction would be submitted to the committee, and the committee would have 60 days to indicate its approval or disapproval of the action contemplated.

Thereafter, on June 29, 1956, the Director of the Fish and Wildlife Service informed the Chairman of the Committee of proposals for the development of the oil and gas resources in the Kenai National Moose Range, noting that Delegate Bartlett of Alaska concurred in the proposal to issue oil and gas leases on 71,680 acres of land in the Range. Under date of July 27, 1956, the Chairman of the

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[4] Hearings before the Senate Subcommittee of the Committee on Interest and Foreign Commerce, 84th Cong., 2d sess., on S. 2101 and Hearings before the House Committee on Merchant Marine and Fisheries, 84th Cong., 2d sess., on H.R. 5306, H.R. 6723, and H.R. 8839.

Committee informed the Director that, after considering the matter, the members of the Committee were unanimous in the view that the proposal would not prove detrimental. The Chairman stated "Accordingly, I and the Committee, concur in the judgment of the Fish and Wildlife Service with reference to the issuance of the leases."

[fol. 113] "Surely such a record constitutes ratification of administrative construction, and confirmation and approval" of the Secretary's interpretation of the 1941 Executive Order. *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275, 293 (1958); *City of Fresno* v. *California*, 372 U.S. 627 (1963); *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 119 (1947); *Brooks* v. *Dewar*, 313 U.S. 354, 361 (1941); *State of Wyoming* v. *United States*, 310 F.2d 566, 580 (C.A. 10, 1962). The theory of these cases, all of which relate to administrative construction of acts of Congress, would seem to apply with much greater force here where the basic instrument to be construed is an Executive Order. It seems hard to believe that the Secretary of the Interior could consistently, over a period of years, misconstrue the intention of the President.

CONCLUSION

We respectfully request this motion for reconsideration be granted.

/s/ Ramsey Clark
Assistant Attorney General
/s/ Roger P. Marquis
/s/ Edmund B. Clark

Attorney, Department of Justice
Washington, D.C., 20530

OCTOBER 24, 1963

[fol. 114] CERTIFICATE OF SERVICE
[Omitted in printing]

[fol. 115]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1963

No. 17,598

Filed November 8, 1963 Nathan J. Paulson, Clerk

JAMES K. TALLMAN, ET AL., APPELLANTS

v.

STEWART L. UDALL, Secretary of the Interior, APPELLEE

Before: Wilbur K. Miller, Bastian and McGowan, Circuit Judges, in Chambers.

ORDER GRANTING LEAVE TO FILE MOTION FOR RECONSIDERATION AND DENYING MOTION FOR RECONSIDERATION—November 8, 1963

On consideration of appellee's motion for leave to file motion for reconsideration, and it appearing that appellee's motion for reconsideration of denial of petition for rehearing has been lodged with the Clerk, it is

ORDERED by the court that the aforesaid motion for leave to file be granted, and the Clerk is hereby directed to file appellee's motion for reconsideration of denial of petition for rehearing in this case, and on consideration whereof, it is

FURTHER ORDERED by the court that appellee's motion for reconsideration of denial of petition for rehearing is denied.

Per Curiam

[fols. 116-117] * * * *

[fol. 118]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 119]

SUPREME COURT OF THE UNITED STATES

[Title Omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—January 11, 1964

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 6, 1964.

/s/ Earl Warren.
Chief Justice of the United States

Dated this 11th day of January, 1964.

[fol. 120]

SUPREME COURT OF THE UNITED STATES

No. 813, October Term, 1963

STEWART L. UDALL, Secretary of the Interior, PETITIONER

v.

JAMES K. TALLMAN, ET AL.

ORDER ALLOWING CERTIORARI—March 30, 1964.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 728683 887